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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1955

## No. 156

ELMER F. REMMER, PETITIONER,

*vs.*

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 15, 1955
CERTIORARI GRANTED OCTOBER 10, 1955

# No. 14508

# United States
# Court of Appeals
## for the Ninth Circuit

ELMER F. REMMER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

# Transcript of Record

Appeal from the United States District Court for the District of Nevada

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California—3-31-55

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## NAMES AND ADDRESSES OF ATTORNEYS

LESLIE C. GILLEN,
Crocker Building,
San Francisco 4, California,
JOHN R. GOLDEN,
Crocker Building,
San Francisco 4, California,
SPURGEON AVAKIAN,
Financial Center Building,
14th at Franklin,
Oakland 12, California,
LOHSE & FRY,
220 South Virginia Street,
Reno, Nevada,

For the Appellant.

MADISON B. GRAVES,
United States Attorney,
Post Office Building,
Reno, Nevada,

For the Appellee.

In the United States District Court for the District of Nevada

No. 12,177

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMER F. REMMER, Defendant.

# AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL

State of California,
City and County of San Francisco—ss.

Leslie C. Gillen and John R. Golden, being duly sworn, each for himself and not one for the other, deposes and says:

That he is one of the defendant's attorneys in the above-entitled case and participated in the trial thereof.

That the trial of said case commenced on November 28, 1951; that the jury reached its verdicts on February 22, 1952; that subsequently and on February 23, 1952, affiant first learned of the facts hereinafter averred.

That in December, 1951, or January, 1952, a person unknown to affiant had a conversation with one of the jurors in said case, namely, I. J. Smith, who later became the foreman of the jury; that in the course of said conversation said person made a remark to said Smith to the effect that said Smith

could profit by bringing in a verdict favorable to the defendant; that said Smith promptly reported the substance of said conversation to the trial Judge in said case, Honorable Roger T. Foley, and the latter conferred with the prosecuting attorneys concerning same; that as a result the Federal Bureau of Investigation was requested to and did make an investigation of said incident and made a report thereon; that neither Judge Foley nor the prosecuting attorneys related said incident to any of defendant's counsel and the latter were kept in complete ignorance thereof until the verdicts had been reached, and thereafter learned thereof only through the press; that copies of articles appearing respectively in the San Francisco Chronicle and the Oakland Tribune on Sunday, February 24, 1952, are attached hereto and by this reference incorporated herein.

That, had defendant's counsel been apprized of the situation, they would have moved for a mistrial and further would have requested that Judge Foley remove said Smith as a juror and substitute an alternate juror, of which there were two, for him, for the reason that said Smith, having had such conversation, quite naturally would be apprehensive of being suspected and criticized were he to vote and attempt to have the other jurors vote for a verdict in favor of the defendant, and thus would be and was prejudiced against the defendant by reason of such conversation; that the omission of the trial Judge to bring the facts of the aforesaid out-of-Court incident to the attention of defense

counsel at the time of its occurrence prevented defense counsel from making timely efforts to avoid prejudice to the defendant as aforesaid and his acts and conduct deprived defendant of a fair trial.

That the interests of justice demand and affiant respectively moves that there be a trial of this issue, that he be permitted to adduce evidence at such trial, that subpoenas be issued for the attendance at such trial as witnesses of the jurors, the trial Judge, the members of the United States Attorney's office and other prosecuting counsel, the Agents of the Federal Bureau of Investigation, the person who communicated with the juror I. J. Smith and others who participated in the incident described hereinabove, and that defendant through his counsel be permitted to examine fully into the conversation and what took place between such unidentified person and the juror Smith, the conversation and what took place between the juror Smith and the trial Judge, the conversation and what took place between the juror Smith and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the prosecuting attorneys or any of them and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the juror Smith and the Agents of the Federal Bureau of

Investigation or any of them, the conversations and what took place, pertaining to this incident between the juror Smith and the other jurors or any of them, the conversation and what took place between the unidentified person who spoke to the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, and generally into all matters and things pertaining to the incident described hereinabove in order to fully investigate the same to determine to what extent it had any effect on the jury and was prejudicial to the defendant.

/s/ LESLIE C. GILLEN
/s/ JOHN R. GOLDEN

Subscribed and sworn to before me this 28th day of February, 1952.

[Seal] /s/ WILLIAM H. BENDER,
Notary Public in and for the City and County of San Francisco, State of California.

Remmer Jury Cleared in Hint of 'Fix'

Judge Reveals FBI Made Probe After Report of Remark to One of Panel

By Victor Stier, Tribune Staff Writer

Carson City, Nev., Feb. 23.—Federal Judge Roger T. Foley revealed today that the FBI investigated the possibility of jury tampering midway in the income tax evasion trial of Elmer E. (Bones) Remmer.

The FBI found no evidence of tampering in its inquiry, Judge Foley said.

Remmer, Bay area and Nevada gambler, was found guilty by a jury last night of four of the six counts of tax evasion on which he was indicted in 1948. He is now in the Washoe County Jail at Reno awaiting sentencing, which has been set for 3 p.m. next Friday.

From his jail cell today, Remmer declared, "We're going to fight this thing through. We've just started. If I had it to do all over, I'd do it the same way with the same lawyers."

### Remark by Juror

Judge Foley said the tampering investigation stemmed from a remark made to one of the jurors, I. J. Smith, a Reno insurance and realty man, who subsequently became jury foreman.

Sometime in December, the judge related, Smith came to him and told this story:

A former client of his (Smith's) had come to his home on business. During the course of their conversation, he made a remark to the effect that Smith could get a lot of money out of the trial through the defense.

Smith told the judge he thought the man, a dealer in a Reno gambling casino, had simply made a waggish remark and that he was kidding. However, in view of Judge Foley's admonitions not to discuss the case, Smith said he decided to report the incident.

### Asks FBI Check

Judge Foley said today that he informed the prosecution, but not the defense, and had the Reno office of the FBI check the story.

"It was the conviction of the FBI, and my own, that the man made a remark in bad taste."

Asked why he didn't tell the defense, Judge Foley explained: "If there was anything to the report, it probably would have been a defense move. If it had been a police officer or an internal revenue man who had made the remark, I would have notified the defense and not the prosecution, so as to eliminate any possibility of their stopping the investigation."

### Attorneys Aroused

Defense attorneys were irate when informed of Judge Foley's story.

"Any conference with the judge should have had both sides present," they declared in a statement.

"If we had been informed, as we had a right to be, we would have strongly urged Judge Foley to excuse the juror and replace him with one of two alternates since it would have been only natural for that juror to lean over backwards to avoid any possible criticism or suspicion.

"If the judge gave the report enough weight to refer it to the FBI, it is all the more reason why we should not have been kept in ignorance."

### Denies Tampering

Smith denied the report but admitted, "I did talk to Judge Foley about another thing. Nobody tried

to influence me. The man might have been out of line, but he did not try to tamper with me."

Asst. U. S. Attorney Bruce Thompson said: "I can't talk about it."

Remmer was dressed in a light tan, monogrammed sport shirt and tan checked slacks when he talked with newsmen in the Reno jail today.

His declaration to "fight this thing through" backed up statements made last night by his attorneys, who said they will file formal motions of appeal and for a new trial early this week.

Reno Gambler Talked With Juror

Jury Tampering Charge Enters the Remmer Case

By Pierre Salinger, Chronicle Staff Writer

Carson City, Nevada, Feb. 23—Elmer F. (Bones) Remmer's attorneys are going to bring up the matter of a "secret investigation" of alleged tampering, when the San Francisco gambler's conviction for tax evasion goes to the Federal Circuit Court in San Francisco on appeal.

The announcement was made today after Federal Judge Roger T. Foley confirmed that he had summoned the FBI to check into a visit a gambling house dealer paid to one of the jurors hearing the case.

The Judge said he had informed the prosecution about the incident, but had not mentioned anything about it to the defense.

As Attorneys Leslie C. Gillen and John R.

Golden began preparing the way for an appeal, their client spent his first day in the Washoe County Jail. He was sent to jail Friday after the jury convicted him on four counts of criminally evading his income taxes in the years 1944 and 1945. The jury could not agree on two other counts involving Remmer's taxes in 1946.

## Gambler's Visit

The gambling house dealer's conversation with a juror took place in December, when the trial was less than a month old. He called on I. J. Smith, a Reno real estate dealer and insurance man, a member of the jury and later its foreman, to consult with him about some automobile insurance.

In the course of the conversation the dealer said:

"You could get a pile if you would go along with Bones."

Smith, who confirmed the incident, said he considered the remark only a jest, but he reported it the following day to Judge Foley.

The Judge, who said he also did not take the remark seriously, called in the FBI because, he said, "a Judge should take every precaution." The FBI's report confirmed his belief that the remark was not meant seriously, the Judge added.

## Defense Objections

Asked why he had notified the Government's attorneys about the "innocent incident," but not the defense, Judge Foley explained:

"This incident turned out to be harmless. But if there had been anything to it, and if we had told

the defense, it would have stifled our investigation."

Gillen and Golden objected to this comment.

"Any conference with the Judge should have had both sides present," they said in a joint statement. "By definition, all parties are present at a conference.

"If we had been informed, as we had the right to be, we would have strongly urged Judge Foley to excuse the juror and replace him with one of the two alternates. Under the circumstances, it would have been the natural thing for that juror to lean over backward to avoid any possible criticism or suspicion.

"Judge Foley gave the incident enough credence to refer it to the FBI. That is all the more reason why he should not have kept us in ignorance."

## First Night in Jail

The attorneys reported today that, in spite of the secrecy, they had finally learned of the incident.

Remmer, meanwhile, reported he was well rested after spending the night in jail for the first time in his life.

When he arrived at the jail in Reno after his conviction last night, he made up for the lack of a pillow in his cell by curling up his clothes and resting his head on them. Then he dropped off to sleep almost instantly.

He chatted briefly with his lawyers and newspapermen.

"If we had it all to do over again, I'd do it with the same lawyers and the same way," Remmer said.

And, to the newsmen who interviewed him through the bars of his little cell, the portly gambler commented:

"I still don't know what I'm here for. I don't know of a single thing I've done to be in here."

[Endorsed]: Filed February 29, 1952.

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[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL

The defendant moves the Court to grant him a new trial for each of the following reasons:

1. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

2. The Court erred in overruling defendant's objections to and denying defendant's motions to strike

(a) The testimony of the witness Scollin and government exhibits 17, 18 and 19 and each of them.

(b) The testimony of the witness Badobinatz and government exhibit 42.

(c) Government exhibits 15 and 60 and each of them.

(d) The testimony of the witness Lando as to his lack of acquaintanceship with certain named persons, viz: Joe Leonard, Bob Burgess, Sacramento Sam and Crying Mack.

(e) The testimony of the witness Gillingham and government exhibit 58.

(f) The testimony of the witness McCaffery and government exhibit 59.

(g) The testimony of the witness Greenhouse and government exhibit 71.

(h) The testimony of the witness Strong and government exhibits 100 and 100a and each of them.

(i) The testimony of the witness Bray and government exhibit 101.

(j) The testimony of the witness Hill and government exhibit 16.

(k) The testimony of the witness Ezralow as to government's exhibits for identification 154, 154a and 154b and each of them.

(l) The testimony of the witnesses Kyne, Maundrell, Casselini, Busterna, Lando, Silverman and Ezralow and each of them as to the 186 Club and government's exhibit 87, 87a, 88, 88a, 166, 167, 43, 131 and 110f and each of them.

3. The verdict is contrary to the weight of the evidence, especially as to the recognition of the partnerships and of the loans.

4. The verdict is not supported by substantial evidence, especially as to the use of the net worth and expenditures method to compute net income.

5. The Court erred on June 15, 1951, in denying defendant's motion for a bill of particulars.

6. The Court erred on November 15, 1951, in denying defendant's motion to inspect and take copies.

7. The Court erred on November 27, 1951, in denying defendant's motion for production and inspection of books, papers, documents and objects and in quashing the subpena duces tecum issued in connection therewith.

8. The Court erred in compelling defendant's counsel, during the trial, to produce defendant's books and records and in denying defendant's motions to return them and suppress their use in evidence and in admitting them in evidence over defendant's objections.

9. The Court erred in denying defendant's motions, during the trial, for the production and inspection and admission in evidence of defendant's books and records taken and retained by the government and withheld from evidence.

10. The Court erred in sustaining objections to questions addressed to the witnesses Kyne, Maundrell, Schriber, Weaver, Brady, Morgan and Harkness and each of them for the government, and the witnesses Semenza, Woodburn, Thatcher, Graham, Edna Jeffress, James Jeffress and Golden and each of them for the defense, and in rejecting defendant's offers of proof in connection with said defense witnesses and said Brady.

11. The Court erred in refusing to allow in evi-

dence defendant's exhibits Z, D1, E1 and F1 and each of them.

12. The Court erred in admitting testimony of the witness Weaver, especially as to an alleged conversation with the defendant.

13. The Court erred in charging the jury and in refusing to charge the jury as requested.

14. The Court erred in denying the defendant's motions for a mistrial.

15. The Court erred in permitting the attorney for the government over objection to argue to the jury outside the record.

16. The Court erred in denying defendant's challenge for cause to the prospective juror John W. Humphrey.

17. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the jury, the Court, the prosecuting attorneys and the Agents of the Federal Bureau of Investigation and each of them in the circumstances described in the affidavit filed herewith, which by this reference is incorporated herein. The interests of justice demand and the defendant respectfully moves that there be a trial of this issue, that he be permitted to adduce evidence at such trial, that subpoenas be issued for the attendance at such trial as witnesses of the jurors, the trial Judge, the members of the United States Attorney's office and other prosecuting counsel, the Agents of

the Federal Bureau of Investigation, the person who communicated with the juror I. J. Smith and others who participated in the incident described in said affidavit, and that defendant through his counsel be permitted to examine fully into the conversation and what took place between such unidentified person and the juror Smith, the conversation and what took place between the juror Smith and the trial Judge, the conversation and what took place between the juror Smith and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the prosecuting attorneys or any of them, the conversation and what took place between the trial Judge and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the prosecuting attorneys or any of them and the Agents of the Federal Bureau of Investigation or any of them, the conversation and what took place between the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, the conversations and what took place, pertaining to this incident, between the juror Smith and the other jurors or any of them, the conversation and what took place between the unidentified person who spoke to the juror Smith and the Agents of the Federal Bureau of Investigation or any of them, and generally into all matters and things pertaining to the incident described in said affidavit in order to fully investigate the same to determine to what extent it had

any effect on the jury and was prejudicial to the defendant.

18. The defendant was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the trial Judge.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOHSE & FRY,
/s/ By JOHN R. GOLDEN,
Attorneys for Defendant

[Endorsed]: Filed February 29, 1952.

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[Title of District Court and Cause.]

## STATEMENT OF POINTS RELIED UPON BY DEFENDANT IN SUPPORT OF MOTION FOR NEW TRIAL AT HEARING COMMENCING JUNE 7, 1954

The decision of the Supreme Court (74 S.Ct. 450) vacates the judgment of the Court of Appeals, and remands the case to the District Court with directions to hold a hearing and make a determination regarding the effect of the extraneous jury contacts. The opinion states as follows in a footnote (74 S.Ct. 451):

"The motion for a new trial was also grounded on many other contentions, several of which have also been presented to this Court. Because of our disposition of the case on the issue

treated herein, we do not pass upon these additional questions."

This leaves all of the issues in the case pending at this time, with no final disposition as to any of them. To avoid any possible contention that defendant has abandoned any of the points raised in this Court on his Motion for New Trial, in the Court of Appeals, on his appeal, and in the Supreme Court on Writ of Certiorari, defendant reasserts all of his points and contentions heretofore made at any stage of the proceeding, and for the convenience of the Court restates his position with respect thereto as follows:

1. The District Court erred in denying defendant's motion for a bill of particulars.

2. The District Court erred in denying defendant's motion to inspect and take copies.

3. The District Court erred in denying defendant's motion for production of books, papers, and documents, and in quashing the subpoena for production.

4. The District Court erred in denying defendant's motion for return of books, papers, and documents, and suppression of their use as evidence, and for permission to adduce testimony in support of the motion.

5. The District Court erred in denying defendant's motion for judgment of acquittal at the close of all the evidence.

(a) The use of the net worth method was not proper because:

(1) There was no showing that the Commissioner

of Internal Revenue had determined, pursuant to Section 41 of the Internal Revenue Code, that the method of accounting employed in keeping defendant's books does not clearly reflect the income of himself and his wife, or that said Commissioner had determined that the net worth method does clearly reflect said income;

(2) There was no showing that the method of accounting employed in keeping defendant's books does not clearly reflect the income of himself and his wife, or that the net worth method does clearly reflect said income;

(3) There was no showing that the amount of income of defendant or his wife, or both, as shown in the government's net worth computations, was established by a return or list made by the Commissioner of Internal Revenue, or by a Collector or Deputy Collector of Internal Revenue with the approval of said Commissioner, pursuant to Section 3612 of the Internal Revenue Code;

(4) There was no showing that the books and records of the enterprises from which defendant derived income were not adequate to clearly reflect the income of himself and his wife;

(5) The starting point net worth was not established;

(6) The net worth at each succeeding year end throughout the period covered by the indictment was not correctly computed in the government's net worth computations.

(b) There was no showing that the partnerships

between defendant and various other persons were fraudulent.

(c) There was no showing that any income was omitted from the returns of defendant or his wife with intent to defeat or evade the tax liability of either one, or that any improper deductions were taken on said returns with such intent.

(d) There was no showing that defendant fraudulently attempted in any manner to defeat or evade the income tax liability of himself or his wife.

6. The District Court erred during the direct examination of government witness Agnes Badobinatz in admitting in evidence, over defendant's objection, and in refusing to strike, testimony of the witness that in February of 1947 her husband, now deceased, "said that he had to go to the bank to get a cashier's check for five thousand dollars to pay Mr. Remmer the money that he had borrowed", defendant's objection to the admission and retention of such evidence and which the court overruled being that it called for "the grossest and rankest hearsay", and there "was no foundation laid" to establish when the indebtedness to defendant was incurred. T. 628, 630, 637-638.

7. The District Court erred, after sustaining an objection by the government, in rejecting defendant's offer to prove by direct examination of witness James Jeffress that in July of 1944, his father, Robert L. Jeffress, now deceased, told him that in February of 1943 he had borrowed the sum of ten thousand dollars and that he then in July, 1944, still owed Elmer Remmer the ten thousand dollars,

the government's objection to the offer of proof, which the court sustained, being "upon the ground it calls for hearsay evidence and that the proof offered is not the primary evidence of the transactions which are sought to be proven". T. 3203-3205, 3207.

8. The District Court erred during the cross-examination of government witness Schriber in rejecting as evidence, after sustaining the government's objection, Defendant's Exhibit Z for identification (T. 3664), to wit, a written statement signed by the witness and reciting among other things that defendant paid Schriber the sum of $50,000 and not $75,000, in 1945, on account of the purchase price of $175,000 for the Menlo Club, the government's objection which the court sustained being "on the grounds that the document purports to be a summary of some kind made in 1949, purporting to be a recitation of certain facts which are signed with the name Gene Schriber and that of Elmer L. Remmer, agreeing as to the facts". T. 2831-2832.

9. The District Court erred during the cross-examination of government witness Weaver respecting Plaintiff's Exhibit No. 165 (T. 3597-3599), prepared by the witness and having reference to the Menlo Club, in rejecting evidence, after sustaining the government's objection, sought to be adduced through a hypothetical question propounded to the witness and designed to show that if defendant bought a business for $175,000 and entered into a partnership for its operation, it would be proper accounting procedure to enter in defendant's

capital account a credit in the sum of $175,000 representing the cost of the business contributed to the partnership, the government's objection which the court sustained being on grounds "assuming facts not in evidence, not containing, in other words, a proper statement of the evidence as it is presently before the Court; third, it is not proper cross-examination and not within the scope of the direct examination". T. 2597-2600.

10. The District Court erred during the cross-examination of government witness Weaver respecting Plaintiff's Exhibit No. 165 (T. 3597-3599), prepared by the witness and having reference to the Menlo Club, in rejecting evidence, after sustaining the government's objection, that in preparing the Exhibit there was uncertainty on the part of the witness as to whether certain expenditures were to be classified as capital expenditures rather than current expenses, the government's objection which the court sustained being on grounds that the evidence was "immaterial and incompetent". T. 2647.

11. The District Court erred during the direct examination of government witness Brady in admitting in evidence, after overruling defendant's objection, Plaintiff's Exhibit No. 183 (T. 3612-3613), prepared by the witness and purporting to reflect the net worth and net income of defendant and his wife for the prosecution years, defendant's objection which the court overruled being on the ground "it is incompetent, irrelevant, and immaterial. It is based on the erroneous conclusions of law and it assumes facts not in evidence and in

many instances it assumes facts directly contrary to the evidence presented by the government." T. 515-538, 2856-2857.

12. The District Court erred during the direct examination of government witness Brady in admitting in evidence, after overruling defendant's objection, testimony of the witness that the total tax liability for defendant and his wife in 1944 would be $10,821.86 each, defendant's objection which the court overruled being that "it is incompetent, irrelevant, and immaterial, that it calls for conclusions of law, and more specifically that it is based upon assumptions of fact which are not covered by the evidence and upon assumptions of fact which are contrary to the evidence". T. 2860-2861.

13. The District Court erred during the direct examination of government witness Brady, in admitting in evidence, after overruling defendant's objection, testimony of the witness that the total tax liability for defendant in 1945 would be $16,951.49, and for his wife, $18,006.18, defendant's objection, which the court overruled, being that "it is incompetent, irrelevant, and immaterial; calls for the witness' conclusions of law, and more specifically it assumes facts which are not in evidence and assumes facts which are contrary to the uncontradicted evidence". T. 2860-2863.

14. The District Court erred during the cross-examination of government witness Brady in rejecting defendant's offer to prove through cross-examination of Brady that the prosecution had in its possession books and records maintained by the

various businesses listed in plaintiff's Exhibit 183, which books, records and papers the prosecution had not produced in court, and that the production of those additional books, records and papers would disprove the testimony of Brady and other prosecution witnesses to the effect that the books and records maintained by such businesses were inadequate and insufficient. T. 2914. The offer of proof was denied. T. 2916.

15. The District Court erred in refusing to instruct the jury as follows at defendant's request. (T. 79-81):

"Defendant's Requested Instruction No. 108:

"In this case the government has attempted to prove that the defendant and his wife owe additional income tax for each of the years in question by reference to what is known as the 'net worth and expenditures' method. This method involves, for each year, the calculation of the increase in net worth from the beginning to the end of the year, and in addition to that increase the amounts spent by the defendant and his wife in the way of expenditures which are not deductible for income tax purposes. In order for this method to be effective the net worth of the defendant and his wife at the beginning and the end of the year must be clearly and accurately established by competent evidence. Before you can treat this total amount—that is, the increase in net worth and the non-deductible expenditures—as taxable income for that year, you must be satisfied beyond a reasonable doubt that all of that money represents taxable income re-

ceived by the defendant and his wife during that particular year. It is not up to the defendant to prove that some of that money was accumulated in prior years or was received by him or his wife in some form other than income, such as loans or gifts or inheritance. Rather, the government must prove beyond a reasonable doubt that its computations are based on income of each of the years 1944, 1945 and 1946. To meet this burden, the government must accurately establish the net worth of defendant and his wife at the beginning and end of each year. It is not sufficient for the government to list simply the assets and liabilities it knows about; it must also satisfy you, by competent proof, that there were no other assets or liabilities in existence. The defendant is not required to show that the government's net worth statements are incorrect or incomplete. If the government's proof leaves an uncertainty as to whether all the assets and liabilities of defendant are included in the government's computation of net worth, it follows that those computations cannot be relied upon." *

* As to each refused instruction defendant's objection was the same: "We do, however, wish to object and except to proposed instructions which the defendant has requested and the Court has refused and we do in each case on the grounds that the instruction refused is a correct statement of the law and applicable to the case; that it is the Court's duty, in a criminal case, to instruct upon every phase of the law which pertains to the case and that the refusal to give these instructions, or the substance of them, results in the Court not performing that duty." T. 3495-3496.

16. The District Court erred in refusing to instruct the jury as follows at defendant's request (T. 81-83):

"Defendant's Requested Instruction No. 109:

"In this case, the government has attempted to prove that the defendant and his wife owe additional income tax for each of the years in question by reference to what is known as the 'net worth and expenditures' method. This method involves, for each year, the calculation of the increase in net worth from the beginning to the end of the year, and the addition to that increase of amounts spent by the defendant and his wife in the way of expenditures which are not deductible for income tax purposes. In order for this method to be effective the net worth of the defendant and his wife at the beginning and the end of the year must be clearly and accurately established by competent evidence. Before you can treat this total amount—that is, the increase in net worth and the non-deductible expenditures—as taxable income for that year, you must be satisfied beyond a reasonable doubt that all of that money represents taxable income received by the defendant and his wife during the particular year. It is not up to the defendant to prove that some of that money was accumulated in prior years or was received by him or his wife in some form other than taxable income, such as loans or gifts or inheritance. Rather, the government must prove beyond a reasonable doubt that its computations are based on taxable income of each of the years 1944, 1945 and 1946.

To meet this burden, the government must accurately establish the net worth of defendant and his wife at the beginning and end of each year. It is not sufficient for the government to list simply the assets and liabilities it knows about; it must also satisfy you, by competent proof, that there were no other assets and liabilities in existence. The defendant is not required to show that the government's net worth statements are incorrect or incomplete. If the government's proof leaves any doubt based upon reason as to whether all the assets and liabilities of defendant are included in the government's computation of net worth, it follows that those computations cannot be relied upon, and you must find the defendant not guilty.

For example, if you are satisfied beyond a reasonable doubt that his net worth at the beginning of a particular year was $100,000.00, and that his net worth at the end of that particular year was $120,000.00; and if you are satisfied beyond a reasonable doubt that his non-deductible expenditures during that year were $10,000.00; and if you are satisfied beyond a reasonable doubt that none of the $20,000.00 increase in his net worth or of the $10,000.00 in non-deductible expenditures came to defendant as a loan, or as a repayment of a prior loan, or as a gift or inheritance, you would then be justified in concluding that his net income for that year was $30,000.00.

If, however, you cannot determine beyond a reasonable doubt the amount of his net worth at the beginning or end of the year, you cannot compute

his net income by this method. As an illustration, if the defendant had an asset at the beginning of the year consisting of cash money in an undetermined amount, so that you could not compute his total net worth at the start of the year beyond a reasonable doubt, you could not determine how much his net worth actually increased during the year. On the other hand, if you should be satisfied beyond a reasonable doubt as to the amount of any such cash, you could compute the net income by this method."

17. The District Court erred in refusing to instruct the jury as follows at defendant's request (T. 84-85):

"Defendant's Requested Instruction No. 114:

"The crucial factor in applying the increase in net worth concept to prove income, is satisfactory proof of the taxpayer's assets at the starting point. In criminal cases the courts insist upon inflexible proof that all of the taxpayer's assets have been accounted for at the start of the tax period in question.

In attempting to prove income for the years in question by the net increase in worth and expenditure method, it is incumbent upon the prosecution expressly to exclude the hypothesis that some of the large expenditures by the defendant, if you find evidence of any such expenditures, might have been made from sources other than current business income.

Without adequate proof that all of the defendant's assets at the beginning of the period were

taken into consideration and his net worth at the time clearly and accurately established by competent evidence, and without excluding the reasonable probability that any increase in net worth or expenditures are traceable to prior accumulations of gifts or loans or other non-taxable items, the defendant must be acquitted."

18. The District Court erred in refusing to instruct the jury as follows at defendant's request (T. 83-84):

Defendant's Requested Instruction No. 111:

"There has been evidence in this case that, in a number of businesses, the defendant entered into agreements with other parties providing that such other parties were to have a 'working interest' in the business, consisting of a specified percentage of the profits, but were to leave their share in the business until the defendant had recovered his investment, at which time the other partners would become partners in the assets of the business as well as in the profits.

Under the law it is permissible for two or more people to enter into such a partnership arrangement. If such an agreement is made, each partner is taxable on his percentage interest in the profits, regardless of how much money he actually draws out of the business. If one partner has originally contributed more of the investment than the other partners, and he draws more than his share of the profits out of the business, the excess simply reduces his investment in the business and is not taxable

income. He is taxable only on his percentage share of the profits each year.

Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates did not intend to operate said businesses as profit-sharing partners, you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year."

19. The District Court erred in refusing to instruct the jury as follows at defendant's request (T. 85-86):

"Defendant's Requested Instruction No. 124:

"During the period involved in this indictment, Sec. 29.41-3 of Regulations III issued by the Secretary of Treasury provided, in part, as follows:

'It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting records as will enable him to do so * * * Among the essentials are the following:

'(1) In all cases in which the production, purchase or sale of merchandise of any kind is an income-producing factor, inventories of the merchandise on hand (including finished goods, work in process, raw materials, and supplies) should be taken at the beginning and end of the year and used in computing the net income of the year. * * *

"(2) Expenditures made during the year should be properly identified as between capital and expense; that is to say, expenditures for items of plant, equipment, etc., which have a useful life extending substantially beyond the year should be charged to capital account and not to an expense account; and

"(3) In any case in which the cost of capital assets is being recovered through deductions for wear and tear, depletion, or obsolescence, any expenditure (other than ordinary repairs) made to restore the property or prolong its useful life should be added to the property account or charged against the appropriate reserve and not to current expenses. * * *"

20. The District Court erred in refusing to instruct the jury as follows at defendant's request (T. 87):

"Defendant's Requested Instruction No. 129:

"There has been testimony in this case that the prosecution has in its possession various business records of the enterprises in which the defendant had an interest, and that the prosecution has not produced those records for introduction in evidence.

It would be proper for you to infer, from the prosecution's failure to produce those records, that they contain evidence which would be detrimental to the prosecution's case and beneficial to the defendant.

Furthermore, in determining whether these business enterprises maintained adequate books and records, it is proper for you to consider that, in

addition to the books and records in evidence, there are other records maintained by these businesses which the prosecution has kept in its possession and has declined to place in evidence."

21. The District Court erred in denying defendant's motion for a new trial.

22. The District Court erred in denying defendant's motion, accompanying the motion for new trial, for a hearing, the subpoenaing of witnesses, and the taking of testimony as to secret communications between court and jury during the trial and as to an investigation of the jury and the defense initiated by the trial judge and conducted by the prosecuting attorney and FBI agents under the supervision of the trial judge during the trial, and of which defendant and his counsel were unaware until after the jury rendered its verdict and was discharged.

Accordingly, defendant urges that the judgment of conviction be vacated and set aside, and that the Court enter a judgment of acquittal or an order granting a new trial.

Respectfully submitted,

JOHN R. GOLDEN,
LESLIE C. GIELEN,
SPURGEON AVAKIAN,
LOHSE & FRY,
By SPURGEON AVAKIAN,
Attorneys for Defendant

[Endorsed]: Filed June 7, 1954.

[Title of District Court and Cause.]

## OPINION, FINDINGS AND ORDER

Upon hearing pursuant to mandate of the United States Supreme Court (Remmer vs. U.S. 347 U.S. 227, 230.)

Louis E. Goodman, District Judge. (Sitting by special designation.)

Pursuant to the directions of the Supreme Court, 347 U.S. 230, a hearing was had in the above entitled court at its court room in Carson City, Nevada, on June 7, 8, and 9, 1954 for the purpose of determining whether or not the "incident complained of," and described in the opinion of the Supreme Court, 347 U.S. 228, was harmful to the petitioner, i.e. defendant Remmer.

The government assumed the burden of proceeding with the evidence. The court heard the testimony of 27 witnesses:

12 members of the jury.

2 alternates on the jury.

The person who communicated with the foreman of the jury during the trial of the case.

The Trial Judge.

The secretary to the Trial Judge.

5 government attorneys who participated in the conduct of the case.

The FBI agent, who investigated the "incident complained of."

A deputy U. S. Marshal who, among other

deputies, had charge of the jury during the trial.

The wife of the person who communicated with the foreman of the jury.

The wife of the foreman of the jury.

One of the attorneys for the defendant.

Since the Supreme Court empowered this court, if it found that "the incident complained of" was harmful to the petitioner, to grant a new trial, the court proceeded as if it were hearing a motion for a new trial based upon the ground that "the incident complained of" was harmful to the defendant. (This is the hearing that the Supreme Court declared should have been held in the first instance.)

I find that what occurred was as follows:

On or about December 20, 1951, after the trial of U. S. vs. Remmer had been in progress approximately three weeks, one James H. Satterly visited the home of Irwin J. Smith, foreman of the jury, for the purpose of conducting some insurance business with Smith, who was an insurance agent or broker. As well, Satterly had a social acquaintance with the foreman as a fellow hunter. During the course of the visit at the foreman's home, Satterly made substantially the following comment: I know Bones Remmer very well. He sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why dont you make a deal with him?

Foreman Smith interrupted Satterly and in substance replied that he was a member of the jury

and that he had been instructed by the court not to discuss the case with anyone. No more was said on the subject.

Foreman Smith regarded the comment of Satterly as being jocular, but, later, after turning the incident over in his mind, and being mindful of the admonition of the court,[1] reported it to the trial judge, the Honorable Roger T. Foley on December 22nd. Thereupon Judge Foley notified the U. S. Attorney's office and Assistant U. S. Attorney Bruce R. Thompson visited Judge Foley. The Judge and Mr. Thompson discussed the incident and Mr. Thompson decided that the incident should be investigated with the view of determining whether Satterly had committed an offense against the laws of the United States.[2] To that end, and for that purpose, FBI agent T. Hiram Collister was directed to make an investigation. Mr. Collister then interviewed Foreman Smith; advising him at the time that he, Smith, was not being investigated, but that the FBI was making an investigation to determine whether or not there had been a violation of law by Satterly. Information concerning Satterly was given by foreman Smith to agent Collister. The agent further made inquiries as to the

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[1] At each recess, the trial judge admonished the jury "not to permit anyone to talk to you about the case * * * if anyone should persist in talking to you about the case, after you have informed them that you are a member of the venire, you report that individual to the court."

[2] 18 USC §1503.

criminal and credit record of Satterly. The FBI was then unable to locate Satterly, who had departed for the northwest. Subsequently, the FBI returned a report to the U. S. Attorney, in substance containing the foregoing facts. The U. S. Attorney's office then determined that there was not sufficient evidence upon which to take proceedings against Satterly. None of the foregoing matters were, at any time, communicated to any member of the jury or to the two alternates, and none of the jurors or alternates learned of the foregoing events until after their verdict was rendered.[3]

Satterly denied that he had made the comment to foreman Smith.

The foreman of the jury testified that the events described in no way affected his state of mind or his vote in arriving at the verdict.[4]

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[3] One of the jurors testified that during the trial one of the deputy marshals who had charge of the jury inquired of him whether he knew or had heard of any outsider talking to a juror about the case. The juror thought that it was deputy marshal Boyd, but was uncertain about it and conceded that it might have been another deputy. Deputy marshal Boyd denied that any such conversation had occurred. Thus the testimony in this regard is most vague, but even if some such event occurred, it had not the slightest bearing upon the subject matter of the hearing, nor did it in any way affect the jury's verdict.

[4] I permitted the witness to testify that the Satterly incident did not prejudice his verdict. There seems to be a division of authority as to whether such opinion testimony is admissible. (See Mattox vs. U.S. 146, U.S. 140; Ryan vs. U.S. 191 F.2d 779,

It is not true that the FBI agent was sent to investigate the foreman of the jury as to his conduct, as was conjectured in the opinion of the Supreme Court (page 229). There is not the slightest doubt, and I so find, that the purpose of the investigation was to determined whether or not *Satterly* had committed an offense.

I am completely satisfied that the incident referred to had no effect whatever upon the judgment, or the integrity or state of mind of the foreman of the jury. After thorough examination, the foreman appeared to me to be a forthright and honest man who took his duties as a juror with the utmost seriousness and with a full understanding of his responsibility.[5] His testimony, plus that of

781; U.S. vs. Rakes, 74 F.S. 645; Higgins vs. U.S. 160 F.2d 222; Stone vs. U.S. 113 F.2d 70.) Being mindful of this state of the law, I stated, at the time the answer of the witness was admitted, that I would not base decision upon such opinion testimony.

[5] One of the jurors, Mrs. Helen Mack, testified that after the verdict, foreman Smith told her that he had been under great pressure. This, if was argued, indicated he had been affected by the Satterly incident. This, however, is a wholly unwarranted inference. The case had been under discussion by the jury for 2½ days. Another juror also stated that he had been under pressure. What was obviously referred to was the strain of several months of trial and days of deliberation, as well as the necessity of attending to the private business of the juror. Since the foreman had relieved his mind by promptly reporting the Satterly incident to the trial judge, it is obvious that he was not referring to it, as a "pressure" in his conversation with juror Mack.

the FBI agent Collister, the Judge of the Court and Assistant U. S. Attorney Thompson, is conclusive that the incident referred to was not in any way concerned with any investigation of the jury as to the conduct of any member of the jury either relating to the trial of the case or otherwise.

Consequently, the court finds that "the incident complained of" was entirely harmless so far as the petitioner was concerned and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any of the members of the jury. Thus any presumption of prejudice[6] is conclusively dispelled. The finding aforesaid is one entirely of fact.

It has been argued by the defense that even though the court should determine factually that the defendant was not harmed, nevertheless, there is still doubt, in a legal sense, as to how the foreman's mind was affected by the incident and therefore the doubt should be resolved in favor of defendant and a new trial granted. But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact.

It has been contended that Satterly's comment to the foreman concerning the defendant's alleged interest in Cal-Neva, was an unauthorized and im-

[6] Remmer vs. U. S. 347 U.S. 229; Mattox vs. U.S. 146 U.S. 140; Wheaton vs. U.S. 133 F.2d 522.

proper communication to a member of the jury relating to a matter in issue upon the merits of the trial, and hence, since it was not disclosed to the defense, warrants a new trial. While the failure of the trial court to disclose this incident to the defense, can be considered error (Remmer vs. U. S. supra), yet at most it would be only presumptively prejudicial. And I find that, in fact, under all the circumstances, it was harmless. U. S. vs. Compagna, 146 F.2d 524, 528.

Ordered, Adjudged and Decreed that the "incident complained of" was harmless to the defendant Remmer and in no way affected the fairness of his trial or the jury's verdict.[1]

Dated: July 10th, 1954.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed July 10, 1954.

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[1] Inasmuch as the Supreme Court has not specified, in its mandate, what the court should do if it finds the "incident complained of" harmless, I have followed the procedure of making the foregoing order. I have directed the Clerk of the court to file the foregoing opinion, findings and order and to forthwith transmit a certified copy thereof to the clerk of the U. S. Supreme Court and furnish a copy thereof to defense counsel and the U. S. Attorney. A true copy of the transcript of the testimony shall be retained by the Clerk to be available to the Supreme Court, if required.

In the United States District Court for the District of Nevada

No. 13,177

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ELMER F. REMMER, Defendant.

## COPY OF JUDGMENT ENTRY OF JULY 10, 1954

Judgment Order. Entg. Judgment.—Judgment. Ordered, Adjudged and Decreed that the "incident complained of" was harmless to the defendant Remmer and in no way affected the fairness of his trial or the jury's verdict.

Copy of Opinion, Findings and Order mailed this day to Supreme Court, John R. Golden and U. S. Attorney.

A true copy from the records. Attest:

[Seal] /s/ AMOS P. DICKEY,
Clerk
/s/ By J. P. FODRIN,
Deputy

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Name and address of appellant: Elmer F. Remmer, Golden Hotel, Reno, Nevada.

Names and addresses of appellant's attorneys: Leslie C. Gillen and John R. Golden, 33 Post Street, San Francisco, California; Spurgeon Avakian, Financial Center Building, Oakland, California; and Lohse and Fry, 220 South Virginia Street, Reno, Nevada.

Offense: Violations of Section 145(b) Internal Revenue Code, 26 USC Section 145(b). (Four counts.)

Concise statement of judgment or order, giving date, and any sentence: The opinion, findings and order, of Honorable Louis E. Goodman, District Judge (sitting by special designation), filed herein on July 10, 1954, that the "incident complained of" was harmless to the defendant Remmer and in no way affected the fairness of his trial or the jury's verdict.

So that this Notice of Appeal be not construed as in any wise an abandonment of the Notice of Appeal filed herein on February 29, 1952, appellant hereby reasserts the same and here at repeats the judgment then appealed, viz: On February 22, 1952, the jury brought in verdicts of guilty of Counts One through Four of the indictment. On February 29, 1952, the Court entered its judgment and commitment and sentenced the defendant to imprison-

ment for a period of five (5) years and to pay a fine of Five Thousand ($5,000.00) Dollars on each of the four counts of which he was convicted and ordered the sentences of imprisonment on counts two, three and four to run concurrently with the sentence of imprisonment on count one, or a total of five (5) years imprisonment and Twenty Thousand ($20,000.00) Dollars fine.

Name of institution where now confined, if not on bail: None.

I, the above named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment, opinion, findings and order and each and every part and the whole thereof, but without prejudice in the event that under the mandate of the Supreme Court this cause is now in or before the Supreme Court.

Dated this 15th day of July, 1954.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOUISE E. FRY,
/s/ By JOHN R. GOLDEN,
Attorneys for Defendant

[Endorsed]: Filed July 16, 1954.

[Title of District Court and Cause.]

## DESIGNATION OF RECORD ON APPEAL

Defendant and appellant Elmer F. Remmer hereby designates as the record on the appeal filed herein on July 16, 1954, the complete record and all of the proceedings and evidence taken in the above entitled matter on June 7, 8 and 9, 1954; and including the opinion, findings and order of Honorable Louis E. Goodman, District Judge (sitting by special designation), filed herein on July 19, 1954, and also including the "statement of points relied upon by defendant in support of motion for new trial, at hearing commencing June 7, 1954" filed in Open Court on June 7, 1954, and also including the motion for new trial and affidavit in support of motion for new trial filed herein on February 29, 1952.

Dated this 20th day of July, 1954.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
LOUISE & FRY,
By JOHN R. GOLDEN,
Attorneys for Defendant and Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 22, 1954.

[Title of District Court and Cause.]

MINUTE ORDER OF AUGUST 23, 1954

Good cause appearing therefor, It Is Ordered that the time to file the Record on Appeal in this action is extended to and including September 20, 1954.

A true copy from the records. Attest:

[Seal] /s/ AMOS P. DICKEY,
Clerk
/s/ By J. P. FODRIN,
Deputy

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that the attached and accompanying documents are the orignals filed in this Court, or true and correct copies thereof, as called for by the Designation of Contents of Record on Appeal filed herein by the appellant, and that they constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of September, 1954.

[Seal] AMOS P. DICKEY,
Clerk
/s/ By J. P. FODRIN,
Deputy Clerk

In the United States District Court for the District of Nevada

No. 12,177

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMER F. REMMER, Defendant.

## TRANSCRIPT OF PROCEEDINGS

Hearing Pursuant to Mandate of the United States Supreme Court to Determine Whether the Incident Complained of Respecting a Juror Was Harmful to the Petitioner and if, after Hearing, it is Found to Have Been Harmful, to Grant a New Trial.

Before: Hon. Louis E. Goodman, Judge presiding.

Be It Remembered, That the above-entitled matter came on for hearing before the Court at Carson City, Nevada, on Monday, the 7th of June, 1954, the Hon. Louis E. Goodman, Judge, presiding.

Appearances: John R. Golden, San Francisco, Leslie C. Gillen, San Francisco, Spurgeon Avakian, Oakland, Lohse & Fry, Reno, Nevada, by George L. Lohse and Leslie M. Fry, Attorneys for Defendant and Appellant. Madison B. Graves, U. S. Attorney, Royal A. Stewart, Asst. U. S. Attorney,

Franklin L. Rittenhouse, Asst. U. S. Attorney, Attorneys for Plaintiff. [1*]

The following proceedings were had:

Mr. Gillen: There is a motion, may it please the Court, with which we were served this morning by the United States attorney for this district, moving to quash one of the subpoenaes duces tecum issued out of this court. I believe that is before your Honor. I presume your Honor would want to dispose of that motion before proceeding.

Then, if I may make the suggestion, it appears to counsel for the appellant that the incident complained of, having been confessed by the government, having been recognized as having occurred by the Supreme Court of the United States, that the burden is on the government to go forward with the evidence to refute, or attempt to refute, the contentions made, that substantial rights of the appellant were affected by the incident complained of. That seems to me to be the logical proceeding.

Mr. Graves: The government has the same view of it, your Honor. I was also serviced—I don't know whether they filed it yet—with Statement of Points Relied Upon by Defendant in Support of Motion for New Trial, at Hearing Commencing June 7, 1954. Have you filed the original of that yet, counsel?

Mr. Avakian: I would like to file at this time, in order to protect our position in the record against

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

any possible contention at a later state, that we have waived any points which we have raised at the various stages of this proceeding, but would like to reassert them all at this time by filing a [2] memorandum which sets them forth. I assume that the Court would not care for verbal argument on the matter, except with reference to the extraneous jury contact point, but we would like to protect the record by reasserting all the points raised in this proceeding. I am handing it to the clerk now. It has not been previously filed. These are our other points raised in the proceeding, other than the jury contact point.

The Court: I do not think this Court has any jurisdiction to hear any matters that were not considered.

Mr. Avakian: That is possibly quite right. We are in the position of not knowing exactly what the posture of the case is, in view of the Supreme Court's statement in the opinion it was not passing on the other questions, in view of the disposition of the jury contact point. We feel all the other questions are still open and we want to preclude any argument that we waive them by not asserting them at this time. The case is now back in the district court, after vacating the judgment of the court and it is simply to protect the matter in that respect.

The Court: I see no objection to filing it. Do you want to proceed with this motion?

Mr. Graves: We do, your Honor. At this time, pursuant to Notice of Motion to quash subpoena

duces tecum, the government would like to present its motion. Would your Honor care to have me read it?

The Court: Yes. [3]

Mr. Graves: (Reads motion) And the Notice of Motion says it will be brought up at this time.

Now at this time, if your Honor please, the government moves, in accordance with the Notice of Motion, the granting of that motion. If your Honor cares to hear argument, I will be glad to argue.

The Court: It appears to me there is no particular need to decide that matter until the time comes to determine whether any records are to be produced when it develops from the evidence it is necessary.

Mr. Graves: That is the view of the government.

The Court: I do not see how the defendant could be bound by that. I assume that the Bureau's records are available and if necessary to have them produced the Court will have them produced. I think we might just pass this motion, to be renewed if it appears any matters that are sought to be introduced are or are not material. I will just reserve ruling.

Mr. Graves: I would just like to make a short statement if I may. It is the government's view that the motion for a new trial, which set forth the particular incident which is the subject of this hearing, pursuant to the Supreme Court mandate, relates to the alleged conduct between J. J. Smith, who was foreman of the jury, and an unidentified person, and it is [4] our understanding that is the

basis, according to the Supreme Court's opinion, on which this hearing is predicated and with that understanding, your Honor, we will proceed.

## IRVING J. SMITH

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): State your name, please.

A. Irving J. Smith.

Q. Where do you live, Mr. Smith?

A. 475 Grove Street, Reno, Nevada.

Q. What is your business or occupation?

A. I am engaged in the real estate and insurance business.

Q. How long have you been so engaged?

A. For the past 19 years.

Q. Are you married, Mr. Smith?

A. Yes, sir.

Q. Please state your wife's name.

A. Dorothea F. Smith.

Q. Mr. Smith, did you serve as a juror in the case of the United States of America vs. Elmer F. Remmer, which was tried in this court, District of Nevada, commencing in 1951? A. Yes, sir.

Q. And in connection with your duties as a juror, did you attend the entire trial?

A. Yes, sir. [5]

Q. Do you recall the date the trial commenced?

A. I didn't hear that.

Q. Do you recall when the trial began?

(Testimony of Irving J. Smith.)

A. I believe it was in late November.

Q. In 1951? A. 1951, yes, sir.

Q. Some time after the trial had begun and after you were sworn as a juror, did any one at any time ever approach you, as a juror, to discuss the case of the United States of America vs. Elmer F. Remmer?

Mr. Gillen: I think the form of that question calls for Mr. Smith's opinion and conclusion. The question is properly did anybody discuss or mention the case to him.

Mr. Graves: I will reframe the question, your Honor.

Q. During the time you were serving as a juror in that case, did any one attempt to discuss or discuss the case with you? A. Yes, sir.

Q. Please state when and where and who.

A. Well, it was some time, I believe, in December, around the middle of December, at my home, 974 Fifth Street in Sparks. I was living there at the time. Mr. James Satterly came to my house one evening and he came for the purpose of discussing problems relative to an automobile accident he had had and about transferring, as I recall, insurance from one car to another.

Q. And who was present at the time he came to your home? [6]

A. My wife was present and Mrs. Satterly was present.

Q. Whereabouts in your home did this interview take place?

(Testimony of Irving J. Smith.)

A. Well, the living room of my home is about 28 feet long and Mr. Satterly and I sat almost at the end of the living room. I believe I was sitting in a chair and he was sitting on a Chesterfield, and at the other end of the room Mrs. Satterly and my wife were conversing.

Q. How long had you known at that time Mr. Satterly?

A. Well, I believe, to the best of my knowledge, it was four or five years.

Q. And in what way had you known him?

A. I sold him a house and I also sold him insurance.

Q. And was that insurance that you sold him for his house or for his car, or what?

A. The insurance in question at that time was insurance on his automobile.

Q. Had you also known Mrs. Satterly?

A. Yes, I had.

Q. How well did you know them?

A. Well, I knew them quite well. Mr. Satterly was a sportsman, he had done a lot of hunting and fishing, as I understand, and that also was my hobby and from time to time I would see him. He called in at the office, we would josh back and forth on our ability as hunters, and so on.

Q. And when you say "josh back and forth", what do you mean by that? [7]

A. Well, I would possibly ask him, "Have you been out during the week hunting?" and if he had and replied that he had been, I asked him how the

(Testimony of Irving J. Smith.)

hunting was, where he went, and he also would ask me questions possibly of the same nature.

Q. You use the term "josh", you say you "joshed back and forth", what do you mean by that? Kidding each other?

A. That's right. He was inclined to josh me a little bit when I possibly wouldn't get any game.

Q. Now directing your attention to the evening in question at your home in December, 1951, please state exactly what took place.

A. I don't believe I can remember exactly what took place, but I will give it to you as near as I can remember. First we discussed problems relative to his insurance and then he said that he knew Mr. Remmer and that I ought to string along with him, or make a deal with him, or words somewhat to that effect. Then I informed him I was a member of the jury and I could not discuss anything in connection with Mr. Remmer.

Q. When he made that statement to you, how did he state it? What was his tone?

Mr. Gillen: If the Court please, I do not think Mr. Smith would be qualified to describe his tone and I do not see that that would be helpful to the Court. I think it is a question for opinion and conclusion.

The Court: What did he say? [8]

A. Just in the same friendly manner he had been speaking during that time.

Q. What did you say to him when he said that?

A. I said, "You know I am a member of the

(Testimony of Irving M. Smith.)

jury and I can't discuss anything in connection with Mr. Remmer." I am not right sure whether those are the exact words, but as near as I can remember that is what happened.

Q. What happened after that?

A. He immediately said no more about the case and we discussed other things in connection with his automobile. It seems as though he had changed cars from an Oldsmobile to a Hudson, and he was all packed ready to make a trip at that time.

Q. How did you conclude, with the matter of the insurance transaction? A. Yes, sir.

Q. And what happened then?

A. Well, we talked possibly for a few minutes after that and then he departed.

Q. Now at any time during this conversation between you and Mr. Satterly, did Mrs. Satterly and your wife come over to where you were in the room? A. No, sir.

Q. Now after that transpired, what, if anything, did you do?

A. Do you mean that very evening?

Q. I mean the next thing you did in relation to this conversation [9] concerning the Remmer case?

A. I didn't do anything with it for some time. I mulled it over in my mind. I wondered whether that was what Judge Foley meant when he would warn us each time that we left the jury box, and as I recall how he warned us was if any one approached us in connection with this case, we should notify them that we are members of the jury, we

(Testimony of Irving J. Smith.)

couldn't discuss it and if they persisted, then we should report it immediately to him. Mr. Satterly did not persist, but all during the next day I thought this thing over in my mind, and due to the nature of it, I felt that I should have some counsel relative to it. I couldn't talk with my wife, I couldn't talk with my attorney, and the only person it seems I could talk to was Judge Foley. It didn't seem as though it came under the category of Judge Foley's warning to me. It seemed more of a jest and yet, due to the nature of it, I thought I should consult Judge Foley.

Q. Did you consult Judge Foley?

A. I did, sir.

Q. When?

A. Well, I believe it was—I don't believe it was the next day, but I believe it was shortly after that.

Q. Where did you go to consult with Judge Foley? A. I went into his chambers.

Q. And by chambers, where were they?

A. Well, they were in this building. [10]

Q. In this building here in Carson City, Nevada?

A. Yes, sir.

Q. And when you went into his chambers, do you remember about what time it was?

A. I can't remember. I believe it was in the morning some time.

Q. And who was present, if anyone, when you went into Judge Foley's chambers?

A. Well, first of all there was one of the secre-

(Testimony of Irving J. Smith.)

taries there and I asked her if I could speak to Judge Foley.

Q. Do you know her name?

A. I do not.

Q. Would you know her if you saw her again?

A. I believe that I would.

Q. And after you spoke to her, then what did you do?

A. Then she relayed her message to Judge Foley and I waited a minute or two and he came out.

Q. When you say Judge Foley came out, just what do you mean?

A. It seems to me as though there were two offices there, one sort of reception room, and I was standing there and he came out and talked to me and we were both standing.

Q. At the time he came out and talked to you, was this secretary present, also?

A. I do not believe she was. I am not quite sure.

Q. Do you know whether she went into her office or his office or where she went? [11]

A. To the best of my recollection, I believe she did leave the room.

Q. And did you then have a conversation with Judge Foley? A. I did, sir.

Q. Was there any one else present at that time at all?

A. No, sir, not to the best of my knowledge.

Q. Please state the conversation.

A. I told Judge Foley that a gentleman had come to my house, being a client of mine, a day or

(Testimony of Irving J. Smith.)

two days, whatever it was, prior to that time, and said that he knew Mr. Remmer and being that I was on the jury, I should string along with him. Judge Foley then asked all the other details of the conversation relative to insurance, I believe, and he felt that the matter was just a joke.

Mr. Gillen: I move that assumption, what Judge Foley felt, be stricken.

The Court: It may be stricken. Just what he said.

A. He said, "You should regard this as nothing but a joke; I don't believe there is anything to it", and I felt the same.

Q. Did he say anything else?

A. Yes, he said: Nevertheless, we will have it taken down", and then he called his secretary and I repeated it again to her and she took it down in shorthand.

Q. You never did know the name of the secretary, did you?

A. Well, I did know. Some one told me her name; but I couldn't [12] recall it right now.

Q. Does the name, Miss Martadel Cooper, refresh your memory in any way?

A. I wouldn't be sure.

Q. After the secretary came in—incidentally, did all this take place in the reception room?

A. Yes, sir.

Q. When the secretary came in, what did you then say?

(Testimony of Irving J. Smith.) :

A. I repeated to her the same as I had told Judge Foley.

Q. And what was said after that?

A. Judge Foley said, "That will be all", and I left the chambers.

Q. Did he say anything else to you?

A. No, sir.

Q. Now at any time you were present in that reception room, did anybody else come into the room except Judge Foley's secretary?

A. Not to the best of my knowledge.

Q. Now then after that, where did you go?

A. Came out here to the hall where the other jurors were. I believe we were in recess at that time.

Q. Did you then resume your jury duties?

A. Yes, sir.

Q. Now at any time thereafter did anybody contact you from the United States government in relation to that conversation? A. Yes, sir. [13]

Q. Please state who it was, if you know?

A. I don't know his name.

Q. Do you know what representative capacity he was in for the government?

A. Yes, he showed me a card that he was a member of the FBI, showed me his credentials.

Q. Would you know that man if you saw him again?

A. I don't know whether I would or not. I might.

(Testimony of Irving J. Smith.)

Q. Do you know whether or not he is in the court room at this time?

A. I don't recognize him.

Q. Would you stand up, Mr. Callister. Do you recognize that man?

A. I believe that is the man.

Q. When did Mr. Callister see you?

A. I don't remember exactly when it was. It was possibly several days later than this. It was in my office in Reno.

Q. Do you know about what day of the week it was?

A. Well, it must have been on a Saturday. We were in recell on account of the bad weather. I am not right sure about that.

Q. When he came in to see you in your office, was any one else present except you and he?

A. No, sir.

Q. Did he have a conversation with you?

A. Yes, sir. [14]

Q. Please state the conversation.

A. He told me that he had been instructed to come and interview me relative to this conversation I had with Mr. Satterly.

Q. Did he tell you by whom he had been instructed? A. Yes, sir.

Q. By whom? A. By Judge Foley.

Q. And what else was said?

A. Practically the same things that occurred in the room with Judge Foley.

Q. If you can recall, will you please state in

(Testimony of Irving A. Smith.)

detail the conversation between Mr. Callister and you.

A. I don't believe I can recall that conversation with any degree of accuracy.

Q. Can you remember what Mr. Callister said to you?

A. He asked me how long I had known Mr. Satterly and what relationship there was between him and me in a business way. He asked if I had ever gone hunting with Mr. Satterly, if I knew Mrs. Satterly, and I told him I did on one occasion. I did hunt with Mr. and Mrs. Satterly. In fact, we didn't hunt together, we were in the same club.

Q. What club was that?

A. It was the Greenhead Club in Fallon. There was one funny incident that we joked about on several occasions on this hunting trip I took. My wife and I were in a decoy blind and Mr. Satterly [15] came over and shot our decoys.

Q. Were you and Mr. Satterly in the habit of joking with each other?

A. Yes, very frequently.

Q. Did you answer all Mr. Callister's questions?

A. Yes, sir.

Q. Can you give us, to the best of your recollection, the answers that you made to those questions?

A. Well, I repeated to him the conversation, as near as I remembered it at the time Mr. Satterly was in my home on the night in question, and I told him, of course, other things of our social relationship, like hunting, and we discussed those things

(Testimony of Irving J. Smith.)

from time to time. Also about the fact that Mr. Satterly was about to leave and he called me in and told me his home was for sale. I tried to sell it and couldn't sell it, but another real estate firm did sell it; then he called me in to check the deal to see if it was correct or not.

Q. Now was there anything else said between Mr. Callister and you that you can recall at this time?

A. There possibly was other things said. I don't remember. If there is such a thing as a transcript of that, it might refresh my memory.

Q. Did Mr. Callister ever say to you why he was there?

A. Yes, he said he was sent there by Judge Foley.

Q. That is all he said? [16]

A. To check and see whether there was anything to this or not.

Q. And what happened then?

A. Then he left. One other thing—he asked me, as I recall now, did I know where Mr. Satterly was. I told him then that I believed he had left town because he was all packed in his car at the time he came to my house, and I did have an address where he might be found, and I gave that to the FBI.

Q. Do you know where that address was?

A. It was some place in Oregon.

Q. What happened then?

A. Then he left.

Q. Did he at any subsequent time to that date,

(Testimony of Irving J. Smith.)

during the trial, up to and including the time you brought in the verdict, which I believe was February 22, 1952, did you ever see Mr. Callister again?

A. No, sir.

Q. Were you ever contacted by any other member of ~~the~~ United States government?

A. No, sir.

Q. Referring back to the statement made by Mr. Satterly to you, "Why don't you make a deal with Mr. Remmer?", did you ever make such a deal with Mr. Remmer?

A. Did I ever make a deal? No, sir.

Mr. Gillen: What do you mean, "such a deal"?

Q. Did you then continue on as a member of the jury until the [17] conclusion of the trial?

A. Yes, sir.

Q. Were you subsequently elected foreman of the jury? A. Yes, sir.

Q. Did you ever discuss the conversation between Mr. Satterly and you with any one other than Judge Foley and Mr. Callister and Judge Foley's secretary? A. No, sir.

Q. Did this conversation between Mr. Satterly and you in any way prejudice your verdict?

Mr. Gillen: Your Honor, I object—it is incompetent, irrelevant and immaterial under the authorities. The universal rule appears to be, from the decisions, that a juror's own conclusions or expressions in support of or against his verdict is not acceptable. This type of hearing requires a narrative of the facts and events, from which the

(Testimony of Irving J. Smith.)

trier of those facts concludes, from all the evidence, what may or may not have been effect, and Mr. Smith can no more express, under the authorities, his opinion as to whether or not this affected his feelings than he can turn around and attempt to impeach his verdict. The language referring to this is found in Mattox vs. United States, 140, 13 S. Ct. 50, is as follows—this is not a quote, your Honor, it is from a memorandum that was prepared, of which your Honor has a copy, page 6.

The evidence of jurors as to the motive or [18] influence which affected their deliberations is inadmissible either to impeach or support their verdict; they may testify to any facts bearing on the question of the existence of any extraneous influence, but not as to how far that influence operated on their minds.

That is the Mattox case, the rule which appears to be universal and I think the objection is sound.

Mr. Graves: Your Honor, in Mr. Gillen's own authorities appears the concession that there are courts that take the view that a juror may defend his verdict in such a matter as this and the three cases involving alleged attempts to reach a juror, in which such testimony and such question was permitted. Those cases, your Honor, two of which are cited in counsel's memorandum, are the case of Stone vs. United States, 113 Fed. (2), and United States vs. Rakes, 71 F. Supp., 645, and the case of Higgins vs. [illegible], S., which is not cited in the memorandum, 160 Fed. (2), 222. In the Higgins case,

(Testimony of Irving J. Smith.)

if your Honor please, during the trial the mother of the defendant was seen talking to a juror. As a matter of fact, she offered the juror a bribe. The juror immediately reported it to the Judge before the trial was over. The hearing was had on the mother and she was found guilty and sentenced and in that case they had a hearing, such as this, at which hearing the juror was permitted to testify that she was in no way prejudiced by the alleged approach by [19] this third party, the mother of the defendant. To the same effect are the other two cases I have mentioned to your Honor and which are cited in the memorandum of authorities by the defense, and as a matter of fact on page 6 of that memorandum we find this language of the defense that: "There is some authority to the effect that, when an attack is made upon a verdict for extraneous jury contacts, jurors may be heard to give evidence that their impartiality has not been affected", citing United States vs. Rakes case; and again on page 7 of the same memorandum in citing from the Ryan case, we read this language:

"The general rule which forbids jurors to testify relating to their motives and reasons influencing their verdict, does not necessarily preclude a juror from disclaiming bias when its existence is asserted because of private conversations or communications. Though a verdict, therefore, may or may not be impeached by testimony of a juror, depending upon the circumstances, it may in such a case as this be defended, and this may be done with the aid of a

(Testimony of Irving J. Smith.)

juror's own evidence that his impartiality had not been affected."

Now the general rule is as stated by the defense, the juror may not impeach his verdict as such, although federal courts seem to avoid making of it a flexible rule and certainly we have an [20] extraneous contact. We are not asking him his mind processes and asking him to defend his verdict, and in asking whether or not he was prejudiced, I think the rule is as in the Higgins, Rakes and Stone cases, that he should be permitted to answer that question and with the citation of those additional authorities I gave your Honor, I think that is the statement of law.

The Court: I have the same apprehension about the rule the judge had in that Rakes case. I am not at all sure that it makes any difference what statement is made by the party interested as to his view as to his own mind processes, but I will allow the testimony, but so there will be no apprehension on the part of either side, the record will show that I am not going to decide this matter on the basis of statements of opinion of any of the witnesses. It may not be inadmissible and I think, therefore, that the objection goes to the weight of the testimony, and as to its weight, I do not see at the moment any reason why the Court should give weight to the testimony as to this any more than any other matter. There is nothing sacred about this inquiry that distinguishes it from any other inquiry.

Mr. Graves: May I make this observation, your

(Testimony of Irving J. Smith.)

Honor, obviously the cases that show conclusion, those cases were in minority, but even in those cases, the Ryan case, the language of the Court shows, even where they allow such testimony to come [21] before them, the judge's conclusion, quoting from the language in the Ryan case, which appears on page 7:

"The judge's conclusion to that effect—" that is, opinion expressed by the juror:

"—however, may not rest entirely upon the testimony of the jurors, because that alone is too uncertain a basis for resolving the issue of prejudice."

The Court: Unless there was some basis, Mr. Graves in their evidence for a conclusion, I would not rest the decision on the opinion; that is why I said to you that I would admit the testimony, because I think that the objection goes more to the weight than it does to the admissibility, and then when it comes to the question of appraising the testimony as to its weight, I feel any court should rest its decision on the basis of the testimony. Will you answer the question.

(Last question read.)

A. No, sir.

Q. When did you next hear anything about this incident?

A. After we had reached a decision in the jury room, we had come down into the court room here and been dismissed, and I went out into the hall with the other jurors, one of the ladies, I believe,

(Testimony of Irving J. Smith.)

A. It may have been and may not, I don't remember.

Q. Now you remember the affidavit that you made for Mr. Avakian and it has been gone over by you and your attorney, Mr. Robinson?

A. Yes, sir.

Q. Now you kept this affidavit in your possession, or in the possession of yourself and your personal attorney, for some considerable time, did you not, before you signed it?

A. No, sir, I never had it in my possession.

Q. I mean the affidavit was prepared and left at the office of your attorney and it was not executed by you until some considerable time after Mr. Avakian had obtained the information from you? A. That is right.

Q. As a matter of fact, I think we established Mr. Avakian spoke to you December 15, 1953; and it is true, is it not, that the affidavit was not actually executed by you until January 30, 1954, a month and a half later?

A. That is possibly true.

Q. And it is true, is it not, that you and your attorney went over this affidavit and refused it and amended it, isn't that [25] true?

A. When I was up in my attorney's office, he said, "I have that affidavit prepared here", and I read it and I said, "Well, doesn't sound hardly right to me", because there was one amendment was put in there, in which I said Judge Foley said, "You should regard this as a joke; it looks like

(Testimony of Irving J. Smith.)

a joke to me", or words to that effect, and I said, "If you put that into the affidavit, to the best of my knowledge I don't remember anything in connection with it" and he made that correction and I signed it in his office and I guess he sent it to you.

Mr. Gilleh: I exhibit the original affidavit of Mr. I. J. Smith to government's counsel and ask permission to show the affidavit to Mr. I. J. Smith for questioning on the same.

Mr. Graves: May we have your indulgence for a moment, your Honor. (Examines document)

Q. May I approach the witness and hand him this affidavit? Mr. Smith, I hand you here what appears to be an affidavit, bearing your signature, and I ask you to look at the signature attached and sir, is that your signature? A. Yes, sir.

Q. Do you know the signature of the notary?

A. Yes, sir.

Q. Who is that? A. Sidney Robinson.

Q. That gentleman is your attorney and a notary also? [26] A. Yes, sir.

Q. Now would you glance through that affidavit and then I am going to ask you some questions.

A. Yes, sir

Q. Did you read the entire affidavit? Now, Mr. Smith, you testified here this morning on your direct examination that your recollection as to what was said by Mr. Satterly to you in December of 1951 in the living room of your home, was that he knew Mr. Remmer, that you ought to string along with Mr. Remmer and make a deal with him. That

(Testimony of Irving J. Smith.)

Q. But your mind was in a state of uncertainty, to the extent that it bothered you following his departure that night and all of the next day, isn't that true? [31] A. Yes, sir.

Q. And I believe, to use your own words, that you "mulled it over in your mind", debated with yourself, is that correct? A. Yes, sir.

Q. And you wondered if this was what the judge meant by his frequent admonitions about not permitting anybody to discuss the case in which you were sitting as a juror with you?

A. Yes, sir.

Q. And it disturbed you because you couldn't get any advise on the matter, is that correct?

A. Well, it didn't disturb me too much. The question in my mind was whether it would come under the category mentioned by Judge Foley or not. In one sense to me it didn't, because the minute I told him that I couldn't discuss anything, Mr. Satterly said no more relating to that case, yet by virtue of the very nature of it, I thought I should counsel with some one on it because I wasn't sure.

Q. And that disturbed you because you felt you couldn't talk it over with your wife because that would be discussing the case on which you were a juror with any one else?

A. That is right. I couldn't talk it over with any one. I wanted a little counsel.

Q. And you couldn't talk it over with your own personal lawyer also because that would be improper? A. That is right. [32-33]

(Testimony of Irving J. Smith.)

Q. You thought the only person you could talk it over with would be the judge, report to him, is that correct? A. Yes, sir.

Q. Now, Mr. Smith, wasn't it the following morning that you reported the matter to Judge Foley? A. I don't believe it was.

Q. Do you recall what day of the week it was that Mr. Satterly visited you in your home?

A. I don't recall the date.

Q. Do you recall whether it was before or after Christmas of 1951?

A. No. I believe it was before Christmas.

Q. You believe it was early in the month of December?

A. I wouldn't say early in the month, but possibly in the middle of the month.

Q. Now you recall, do you not, Mr. Smith—perhaps you do not, but I think it will be conceded here—that the trial commenced November 28, 1951?

A. Yes, sir.

Q. And there were some two or three days, I believe, consumed in selection of the jury and two alternate jurors? A. Yes, sir.

Q. And then there was some delay because of the absence of Mr. Campbell and the opening statement made on two different days by Mr. Pike, United States attorney at that time for this district, [34] do you recall that?

A. Something relative to that, yes, sir.

Q. And it was well toward the end of the first

(Testimony of Irving J. Smith.)

fainted. The reporters—I think there were three of [22] them——

Q. You mean newspaper reporters?

A. Newspaper reporters—got hold of me and wanted to know all about this conversation that I had with this Reno gambler in my home. I was completely dumbfounded at the time because that was the farthest thought from my mind, and I can't repeat to you other than I believe I told them what actually occurred, Judge Foley had the record of it and that they should see him.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Mr. Smith, have you, since the time of the statement that you made to Judge Foley, taken down by the secretary or young lady who was in Judge Foley's chambers, have you ever seen that statement in transcript form?

A. No, sir.

Q. Has anybody, since that date, December of 1951, read to you that statement? A. No, sir.

Q. Has anybody discussed that statement with you since you gave it?

A. From that time up to this?

Q. Yes. A. Yes, sir.

Q. And will you enumerate the people, if you remember them, who have discussed that statement?

A. I was called one time by a reporter; in fact, he was a reporter from the San Francisco Examiner, and he wanted to know what happened.

(Testimony of Irving J. Smith.)

Q. Can you fix the approximate time of that?

A. I believe that was—well, if you could tell me when Mr. Avakian had an interview with me, I could tell you then just about when it was. It was just prior.

Q. Approximately December 15, 1953 Mr. Avakjan visited you in Reno.

A. It must have been just prior.

Q. I believe Mr. Avakian obtained an affidavit from you?

A. Not on the day he interviewed me.

Q. I mean an affidavit was prepared from your interview and left with Mr. Sidney Robinson, your attorney in Reno, is that correct?

A. That is right.

Q. Now, Mr. Smith, will you tell me again, to the best of your knowledge and recollection, what it was that Mr. Satterly said to you in the living room of your home during the month of December of 1951, the occasion that you identified here.

A. Mr. Satterly said that he knew Mr. Remmer and I should string along with him, or make a deal with him. I don't recall the exact words—that it might be profitable to me, or something like that.

Q. Now you testified here on your direct examination, as I recall [24] it, that Mr. Satterly said to you that he knew Mr. Remmer, that you ought to string along and make a deal with him. You now state that he said something further to the general purport and effect that if you did so, it would be profitable to you, is that correct?

(Testimony of Irving J. Smith.)

was the extent of your testimony here this morning, is that not true? A. Yes, sir.

Q. And then subsequently you testified that in your interview with Mr. Callister that something had been said about making some money, is that true, or that it would benefit you financially?

A. I don't believe anything was ever said in those words, but I took it to infer that that might be so. I am not right clear on that.

Q. Well, in your affidavit you stated, did you not:

"While the trial was in progress——"

I am reading from line 13 of the first page of the affidavit:

"While the trial was in progress, on a date I can not now recall, I had a conversation in my home one evening, in the presence of my wife, with one of [27] my insurance clients in connection with an insurance claim. In the course of the conversation he made a remark regarding the Remmer trial. I do not recall his exact words, but in substance he suggested that I should be able to make a lot of money for myself out of the case. I did not know just what he meant by the remark, but because of Judge Foley's instructions to the jurors to report any incidents in which any one had discussed the case with them, I promptly informed Judge Foley of this occurrence."

And so on. Now what is your best present recollection, Mr. Smith? Did or did not Mr. Satterly mention the word money to you?

(Testimony of Irving F. Smith.)

A. I don't believe he did.

Q. Did you tell Mr. Callister that Mr. Satterly had mentioned the word money to you?

A. I don't remember, sir.

Q. Did you tell Judge Foley that Mr. Satterly had mentioned the word money to you, or that you could make money? A. I don't remember, sir.

Q. Did Mr. Satterly say to you on that occasion: "I see you are a member of the Remmer jury", or "serving on the Remmer jury"?

A. Yes, I believe he did, words to that effect.

Q. You stated in your direct examination that when he made these remarks about the Remmer case to you, you said to him: "You know I am a member of the jury; I can't discuss the case"?

A. I did. [28]

Q. Had he already mentioned to you that you were a member of the jury, that he knew it, or did you call that to his attention first?

A. I called it to his attention, to bring out the fact that we could not discuss the case at that time.

Q. Now, Mr. Smith, Mr. Satterly on that occasion, in December of 1951, came to your home, from all appearances to you, for the specific purpose of discussing his insurance problems with you, is that correct? A. Yes.

Q. And he had two distinct problems he had to take up with you: one was in regard to automobile accident he had and I assume a claim that was pending, is that correct?

A. No, I believe the claim had been paid, as he

(Testimony of Irving J. Smith.)

had contacted our company direct, but he had changed automobiles.

Q. And he wanted to transfer his insurance from one automobile to another automobile, preparatory to going on this trip?

A. As near as I can remember that is right.

Q. When he took those matters up with you, with regard to his insurance, he was talking business and what appeared to be a serious matter, is that correct? A. Yes.

Q. And you were talking with him seriously, is that true? A. That's right.

Q. And were you examining any documents and also any application [29] or papers of any sort?

A. I don't think so.

Q. And was it right in the middle, you might say, of this business conversation, regarding this insurance, that he introduced the subject of the Remmer trial?

A. No, I don't believe that it was.

Q. Well, what is your recollection?

A. I believe that after we come to the conclusion of what we should do in regard to the insurance, that we discussed hunting, visited back and forth, discussed hunting.

Q. Discussed hunting?

A. Visited back and forth, yes, and then he made that remark.

Q. Now had you served any refreshments or anything that evening? A. No, sir.

Q. And by refreshments, I mean any coffee or

(Testimony of Irving J. Smith.)

sandwich or anything else. It was not that much of a social visit, is that correct?

A. No, sir. It wasn't a long visit.

Q. How long in all do you say Mr. and Mrs. Safterly were in your home that day?

A. I don't know exactly. It could have been from a half to three-quarters of an hour, maybe an hour.

Q. After this mention was made of the Remmer case, it is true, is it not, that you again discussed this insurance policy? [30] A. After?

Q. Yes. A. We might have, yes.

Q. I understood you to testify on your direct examination that you said to him, "You know I am a member of the jury; I can't discuss the case with you. He immediately said no more. Then we discussed other things about his auto. He was packed for a trip. At no time did the women come over to where we were sitting." Does that refresh your recollection that you did resume the conversation about his business?

A. Possibly so, yes.

Q. Now you stated that when you talked to Judge Foley that Judge Foley told you that you should regard this matter as a joke.

A. He said it sounded like a joke to him and I should regard it as such.

Q. I believe you testified that you felt likewise, that it was a joke? A. Yes.

Q. Did you feel that it was a joke when he made this comment to you? A. Yes, I did.

(Testimony of Irving J. Smith.)

week of December before the case got underway, do you recall that?

A. Well, it was in December some time, around the middle of December. I couldn't state exactly when it was. I would like to, but I just can't.

Q. Well, you do recall, however, do you not, it was very early in the trial?

A. Well, I believe the trial had been under way for some time before this happened.

Q. About two weeks?

A. Two weeks or maybe three weeks.

Q. Now you can't be sure whether it was the morning after this incident occurred or two mornings after that you took the matter up with Judge Foley?

A. At the time I made that affidavit, or signed that affidavit for Mr. Avakian, I felt that it was during one of our recesses, due to the storms, but since so much has been made of this, I tried my very best to go back over the thing to review it, and I am not sure whether it was due to one of the recesses due to the storms or whether it was one of these you mentioned, being in court and we had a recess, or whether it was on a Saturday.

Q. Did the Federal Bureau of Investigation agent, Mr. Callister, ask to see if there was anything reflected in your office [35] records in regard to any change in policy of Mr. Satterly or anything of that sort, that would identify the time?

A. No, I do not believe he asked to see any records.

(Testimony of Irving J. Smith.)

Q. Do you have any record that shows the change in Mr. Satterly's insurance coverages?

A. Yes, we no doubt have.

Q. Could you produce that?

A. I don't know whether I could or not. I did refer to the records that we had in order to get the address of Mr. Satterly for Mr. Callister.

Q. And did you show Mr. Callister the record of Mr. Satterly's? A. No, sir.

Q. He didn't examine it?

A. Not to the best of my knowledge.

Q. Did you give Mr. Callister any other information from the insurance records of Mr. Satterly, other than this address?

A. I can't remember whether I did or not.

Q. You might have? A. I might have.

Q. This statement that you gave to Judge Foley's secretary, the young woman who I believe has been identified as Miss Cooper, I don't know whether you recall that was her name or not in your direct examination?

A. Yes, sir, I remember that.

Q. Did you sign any shorthand notes for her? Did you sign her [36] shorthand notes?

A. I don't remember whether I did or not.

Q. Did you see a transcription of the shorthand notes that she took down, the typewritten transcription of those notes? A. No, sir.

Q. Did you ever sign the typed transcription of those notes, if they were ever made up, to your knowledge?

(Testimony of Irving J. Smith.)

A. To the best of my knowledge, I did not sign anything.

Q. Now when you talked to Judge Foley, was that morning or afternoon, do you recall?

A. I don't remember exactly, but I believe it was in the morning.

Q. Now was it before court convened at ten o'clock in the morning, or was it during the recess in mid morning? A. It was during recess.

Q. And that was in this court room where we are now? A. Yes, sir.

Q. And the jurors departed from the court room during recess and stood about the hallway just outside, between the court room and the clerk's office, is that correct? A. That is correct.

Q. And as you step out of the court room, to your left, at the extreme left of the hall, you encounter the reception room of the judge's chambers, is that true? A. Yes, sir. [37]

Q. And beyond that, making a right turn after you get into that room, there is another office that seems to be the private chambers of the judge, is that correct? A. That's right.

Q. And when you departed from the court room, you did so, I assume, with the other jurors?

A. Yes, sir.

Q. And did you mention to any other juror that you were going in to see the judge?

A. I do not think so.

Q. Are you sure you didn't?

A. I am quite sure.

(Testimony of Irving J. Smith.)

Q. To your knowledge did any other jurors see you entering the judge's chambers?

Mr. Graves: Your Honor, we object as obviously impossible to be answered by this witness.

The Court: Objection sustained.

Mr. Gillen: I asked him if he had any knowledge that anybody saw him.

The Court: Of course, I wouldn't pay much attention to that sort of evidence. As to whether somebody else saw him do something, I don't think that would matter. You can place the physical fact, where they were.

Mr. Gillen: Well, I will reframe it. [38]

The Court: He might be able to say some juror told him he saw him, but other than that, I don't know how he can know whether any juror saw him or not.

Mr. Gillen: I look over my shoulder and I am sure everybody behind sees me standing here, and if Mr. Smith looked over his shoulder and saw several jurors when he went into chambers, he could assume they saw him.

The Court: It depends where he was standing. You can ask physical facts as to where the jurors were and where they were standing.

Mr. Gillen: Very well, I will reframe the question.

Q. Mr. Smith, when you entered the chambers of Judge Foley, did you part company or leave the immediate presence of any one or more of your fellow jurors?

(Testimony of Irving J. Smith.)

A. Yes. Some of the jurors were standing by the desk and some were standing out there and I had to walk by them; I had to in order to go in to the judge.

Q. Did you say to one of your fellow jurors, "Pardon me, I am going into chambers a minute"?

A. I did not.

Q. Did you look back and take any note as you went in as to any one of the jurors was looking at you as you entered the judge's chambers?

A. It could have been. It could have been possible some of the attorneys were out in the hall there at the same time. [39]

Q. I do not care anything about attorneys, just about the jurors.

The Court: That is conclusion of the witness.

Mr. Gillen: Yes, your Honor.

Q. My question is, do you presently have any recollection that you saw any one of your fellow jurors looking at you as you walked into the judge's chambers?

Mr. Graves: Same objection.

The Court: I think I shall sustain the objection. I don't think this witness can state, unless the juror talked to him.

Q. Mr. Smith, how long would you say, if you can tell us, in point of time that was consumed with your visit with Judge Foley on that occasion?

A. Well, I don't know, possibly about five minutes. It might have been a little longer—it was a very short time.

(Testimony of Irving J. Smith.)

Q. Well, you had related your story twice—once to Judge Foley and once again in the presence of the shorthand reporter, I mean the young lady who took down the shorthand notes, is that correct?

A. That's right.

Q. And would you say it took as long as fifteen minutes, the overall visit you had, relating the story twice?

A. I do not think it took that long.

Q. After Judge Foley said, "Nevertheless we will have this [40] taken down", then I understood you to testify that Judge Foley said "That will be all", is that correct? A. Correct.

Q. Did Judge Foley at that time instruct you as to what should be your conduct in regard to this incident from that moment forward?

A. During the time, I believe I testified to that, that Judge Foley said, "It sounds like a joke to me."

Q. That was Judge Foley's comment on the incident, but did he give you any instructions with regard to what should be your conduct with relation to the incident?

A. I am not right sure, whether he did or not, but I believe he did tell me that I should regard it as nothing but a joke.

Q. Let me ask you this—did Judge Foley say to you, in substance and effect, "Don't repeat or relate this incident to any fellow jurors", did he say that? A. I do not believe he did.

Q. Did he say, "Let us keep this information

(Testimony of Irving J. Smith.)

confidential and discuss it no further with anybody else?

A. I do not think he made such remark.

Q. Did you ask him what you should do in that regard? A. No.

Q. Did you discuss it with any one?

A. No.

Q. And it is your present recollection that Judge Foley gave [41] you no admonition whatever in regard to referring to the incident again or relating it to your fellow jurors?

A. I already testified I believe he said I should regard it as nothing but a joke.

Q. I understand you so testified, but I am attempting to probe your memory on any instruction, or admonition or warning or suggestion or request that Judge Foley gave you with regard to whether or not you should repeat the matter to anybody else.

A. Mr. Gillen, pardon me, but we got instructions all the time up in the jury box that we should not repeat or discuss this case with any one. I did not feel it was necessary for me to get further instructions along those same lines.

Q. Whether you felt it was necessary or not, I am trying to find out from you whether Judge Foley took the precaution to do that, or whether you took the precaution of asking Judge Foley what should be your conduct in regard to the incident that you have related.

(Testimony of Irving J. Smith.)

A. Nothing other than that I should regard this as nothing but a joke.

Q. Now as you left the judge's chambers, what is your recollection as to where your fellow jurors were at that time?

A. I don't know. Some of them were in the hallway, some of them possibly getting a drink of water, maybe somebody in this little room immediately at the rear of the hall.

Q. As you walked out of the judge's chambers, do you know whether [42] any of your fellow jurors were looking at you and observing you walking out of chambers, Mr. Smith?

Mr. Graves: If your Honor please, we object on the grounds and for the reason it is incompetent, irrelevant and immaterial, not within knowledge of this witness.

The Court: That is a waste of time on this matter.

Can you answer it?

A. I don't know whether they were looking at me or not.

Q. Did any fellow juror say to you, "What were you doing in the judge's chambers"?

A. No, sir.

Q. Did anybody ask you what you were doing in the judge's chambers or say that they saw you go in? A. No, sir.

Q. By the way, did you sign anything for the Federal Bureau of Investigation agent, Mr. Callister?

(Testimony of Irving J. Smith.)

A. I am not right sure. I possibly did.

Mr. Gillen: May it please the Court, at this time, in order to intelligently pursue the cross examination of this witness, I ask that counsel for the government be instructed to produce any statement signed by Mr. Smith, or any government representative, and also produce the transcription of the statement that Mr. Smith has told us about, if there is such a transcription in existence, that Mr. Smith told us he made to the judge's secretary in Judge Foley's presence. [43]

The Court: If it is a signed statement, I will order it produced. I do not know what else I can order produced. Somebody else's notes, you can have them produced if they become necessary, if the person becomes a witness.

Mr. Gillen: Of course Mr. Smith does not recall, as I got his testimony, whether he signed anything for Miss Cooper as to her shorthand notes.

The Court: You are talking about something else now. You have asked the Court for an order that the statement made by this witness to the FBI agent be produced. Now if there is such a statement, I will order it produced.

Mr. Gillen: Was any signed statement made to any government agency by Mr. Smith?

Mr. Graves: Your Honor, that brings us back to the motion, we think, to quash subpoena duces tecum upon the grounds set forth therein. Now this is a statement taken by the FBI agent, your Honor. I think you know the policy of the government.

(Testimony of Irving J. Smith.)

We are not trying to conceal anything in this case.

The Court: I am not interested in any statement what the agent says about the matter, but if there is a statement that the witness signed in possession of the FBI, that should be produced.

Mr. Graves: Is that your Honor's order at this time? [44]

The Court: Yes.

Mr. Graves: May counsel approach the bench?

The Court: Yes. There is no jury present. (Conference at the bench) I do not know why you should object to giving the statement. I will allow the counsel to have it on the basis of impeaching. I do not see anything impeaching in it. I do not see why you are objecting to it.

We will take a brief recess.

After Recess—11:45 a.m.

IRVING J. SMITH

resumed the witness stand on further

Cross Examination

By Mr. Gillen:

The Court: Proceed.

Mr. Gillen: This appears to be an altogether different statement than the one I was inquiring of the witness about. This is statement made on March 19, 1954, to an agent of the Federal Bureau of Investigation other than Mr. Callister.

The Court: You had better wait until Mr. Graves

(Testimony of Irving J. Smith.)

comes, Mr. Graves, this statement counsel just called attention to is not what Mr. Gillen was interrogating the witness about. This is statement that was given to some other FBI agent March of this year and the question was directed as to whether or not there was any written statement given by the witness to the agent who interviewed him, Mr. Callister [45] in December, 1951. Is there any written statement by the witness that was given to Mr. Callister?

Mr. Graves: We don't have any written statement, I believe, your Honor.

The Court: There is no such statement. Perhaps I should not have made the ruling. I took it for granted—I read the statement, but I didn't note there was a different FBI agent's name or different date, and it may be that the statement should not have been ordered produced in response to counsel's request.

Mr. Stewart: That is the government's position, that the statement taken to enable us to prepare for trial is not admissible until such time——

The Court: That point was not made. Perhaps that is right. However, it has been produced and counsel has seen it. Do you want to ask any questions now?

Mr. Gillen: May I ask government counsel, through your Honor, whether or not this is the only signed statement purporting to bear the signature of Mr. I. J. Smith, in the possession of the

(Testimony of Irving J. Smith.)

government, regarding the incident reported to Judge Foley.

Mr. Graves: That is the only statement, your Honor, that we have. [46]

Q. Mr. Smith, you still do not know whether you signed a statement for Mr. Callister in December, 1951, or not, is that correct?

A. I do not know sir.

Q. Now, Mr. Smith, I note in the statement of March 19, 1954, which was apparently made by you to an agent by the name of L. J. McGee, Federal Bureau of Investigation, that mention is made by you of the fact that if you strung along with the defendant Remmer, there would be a chance to make some money. Does that refresh your recollection as to whether or not Mr. Satterly mentioned money?

Mr. Graves: Your Honor, again the government suggests that Mr. Gillen show the witness the statement, so he may see it himself.

The Court: I am not sure, from my reading of it, whether that is something that would be said or something that was his opinion.

(Counsel shows witness statement.)

Mr. Gillen: This question was not by way of impeachment, but asking the witness whether or not that refreshed his recollection.

Q. My question is, does that refresh your recollection that Mr. Satterly stated to you that you could make some money if you strung along with Bones, or strung along with the defendant Remmer?

A. By reading that, it does refresh my memory

(Testimony of Irving J. Smith.)

as to what I [47] stated there, and I always felt, whether Mr. Satterly said it in so many words or not, I always felt that money was involved; otherwise why would any question be put to me.

Q. Your answer is then, if I may attempt to interpret your answer—if I am wrong, correct me—your answer is then that you don't recall whether the word "money" was actually used or whether it was your impression that the suggestion was being made that you would receive money?

A. Yes, sir, you are right. I do not recall whether money was mentioned.

Q. Now I am going to show you the affidavit that you made at the request of Mr. Avakian, one of the appellant counsel, which was discussed with you, which Mr. Avakian established was approximately December 15, 1953, and which apparently was not executed by you until amended, by you in the office of your lawyer, Mr. Sidney Robinson, on the 30th of January, 1954, and I will ask you to look at lines 17 to 19 and tell me whether or not that refreshes your recollection that Mr. Satterly said to you that you could make a lot of money if you strung along with Mr. Remmer?

A. I interpreted his remark that money possibly was involved.

Q. It is your recollection now that you don't remember the word "money" was actually used, but you gained the impression from what he said that he suggested you could get some money?

A. That is right. [48]

(Testimony of Irving J. Smith.)

Q. But you thought it was a joke at that time, did you? A. Yes, I did.

Q. Right then when he was saying it?

A. I did, because Mr. Satterly was in the habit of joking quite a lot.

Q. What did you mean then when you said in this affidavit, and I will ask you to read the next two lines, 19 and 20: "I didn't know just what he meant by the remark"?

A. That's right, I didn't know what he meant by the remark.

Q. Then there was uncertainty in your mind as to whether or not he was seriously proposing to you that you do some improper thing for money, or whether he was joking, is that correct?

A. Yes, I didn't know exactly what he meant and that was the reason I went to Judge Foley.

Q. And you never pursued that further with Mr. Satterly, to determine whether he was making a facetious remark or whether it was a serious proposal on his part?

A. Would you repeat that?

(Question read.)

A. I did not.

Q. And you don't know to this day actually whether it was a joke or a serious proposal that you do something improper?

A. No, sir, I do not; other than this, my own ability to reason would tell me that it was a joke, and if you wish for me to give you those reasons, I will be happy to give them to you. [49]

(Testimony of Irving J. Smith.)

Q. Let me ask you this—throughout the trial, from the early part of the trial, two or three weeks after it started, until February, 1952, you were still uncertain in your mind whether Mr. Satterly was in earnest or whether he was joking, isn't that true?

The Court: You mean until the end of the case?

Mr. Gillen: Yes, sir.

A. No. The mere fact that Mr. Satterly left the very next morning, that he was packed in his car and that he could not be reached, and on advice of Judge Foley, I dismissed it completely from my mind.

Q. But Mr. Satterly had left before you actually reported the matter to Judge Foley, hadn't he?

A. I don't know.

Mr. Gillen: Now I will offer this affidavit on behalf of the appellant of January 30, 1954. This is affidavit obtained through the efforts of Mr. Avakian.

Mr. Graves: Your Honor, the government objects on the ground and for the reason no proper foundation has been laid, certainly not for impeaching purposes.

The Court: We will mark it for identification anyway. We have to know what we are talking about. That other affidavit should be marked.

(Exhibit A marked for identification, affidavit of January 30, 1954.)

## DEFENDANT'S EXHIBIT "A"

State of Nevada, (Copy)
County of Washoe—ss.

I, J. Smith, being first duly sworn, deposes and says:

My name is J. J. Smith, and at all times mentioned herein I have been a resident of Washoe County, State of Nevada, and have carried on a real estate and insurance business at 138 N. Sierra Street, Reno, Nevada.

During the period from November, 1951, to February, 1952, I was a member of the jury in the case of United States vs. Remmer, in the U. S. District Court in Carson City, Nevada, over which Honorable Roger T. Foley presided as Judge; and I was elected foreman of the jury.

While the trial was in progress, on a date I cannot now recall, I had a conversation in my home one evening, in the presence of my wife, with one of my insurance clients in connection with an insurance claim. In the course of the conversation he made a remark regarding the Remmer trial. I do not recall his exact words, but in substance he suggested that I should be able to make a lot of money for myself out of the case. I did not know just what he meant by the remark, but because of Judge Foley's instructions to the jurors to report any incidents in which anyone had discussed the case

Defendant's Exhibit "A"—(Continued)

with them, I promptly informed Judge Foley of this occurrence, Judge Foley suggested that it sounded like a joke to him, in which suggestion I concurred, and Judge Foley then called a stenographer into his chambers to take down my report.

At some time thereafter, during a prolonged recess in the trial necessitated by bad weather, an agent of the Federal Bureau of Investigation called on me at my office and interviewed me regarding this same incident. I gave him the facts in as much detail as I could remember them at the time.

The foregoing constitutes my best recollection of the incident hereinabove set forth, and I had no further discussions with anyone concerning the same during the trial of the case herein referred to.

Because this incident occurred approximately two years ago, my recollection is not clear as to all the details, but the foregoing is a substantially correct account of what happened, to the best of my present recollection and belief.

The circumstances herein referred to did not in any respect influence my judgment or decision in arriving at a verdict in connection with the jury trial herein referred to.

/s/ I. J. Smith

Subscribed and Sworn to before me this 30th day of January, 1954.

/s/ Sidney Robinson, Notary Public

(Exhibit B marked for identification, signed statement dated March 19, 1954.) [50]

DEFENDANT'S EXHIBIT "B"

(Copy) Reno, Nevada, March 19, 1954.

I, Irving J. Smith, make the following voluntary statement to Special Agent L. J. McGee who has identified himself as a Special Agent of the Federal Bureau of Investigation. No threats or promises were made to get me to make this statement.

I was on the Federal Jury at Carson City, Nevada, in connection with the trial of Elmer Remmer, and subsequently was selected as foreman of that Jury. The trial started in November, 1951.

Some two or three weeks after the trial had started, exact date not now recalled by me, one James Saterly and his wife called at my home one evening. I was then living at 974 Fifth Street, Sparks, Nevada. Satterly had been an insurance client of mine for a considerable period of time, and he called that evening to discuss an automobile policy. I do not now recall the exact insurance problem involved, but it had something to do with an accident he had had. At the time of his calling at my home, he was packed and ready to leave for Oregon. I have not seen him since that time.

During the above discussions, both Mrs. Satterly and my wife were present, and all four of us were present during the time Satterly was at my home.

At some point during the conversation regarding

Defendant's Exhibit "B"—(Continued)

the insurance, Satterly made some comment to the effect that I was on the jury over in Carson City. I do not now recall his exact words. He then made some comment to the effect that if I would "string" along with "Bones" there would be a chance to make some money. At that point I informed him that since I was on the jury that I could not discuss the case at all, and he laughed and said nothing more about the case.

I felt at the time that his statement was just a joke, but since Judge Foley had constantly admonished the jury that if anyone approached any member of the jury, even though it was felt the matter was insignificant, that he, Judge Foley, should be advised, I felt it best to call the above matter to Judge Foley's attention. This I did, in Judge Foley's chambers. At first the Judge and I were alone, and then he called in his stenographer, but other than her, no one else was present.

Judge Foley, after hearing my comments concerning the matter said that it sounded like a joke, and not to consider the matter further.

At no time did I consider that Satterly's statement was other than a joke. At no time did I believe that he had contacted me at Remmer's request, or at anyone's request. I did not mention the matter to anyone on the jury, or to the alternate jurors. As a matter of fact, I did not discuss the matter with anyone other than Judge Foley and the FBI agent who later interviewed me, until after

Defendant's Exhibit "B"—(Continued)

the trial was over. On the day the verdict was returned, and after the jury was discharged, newspaper reporters asked me about the matter, and that was the first time the matter had come up after my reporting to Judge Foley, except for the interview by the FBI agent.

I wish to state that the above incident had absolutely no effect upon my consideration of the evidence in the Remmer case, and in no way caused me to be prejudiced or biased either for the defendant or for the Government. I wish to add that while I was not prejudiced or biased in any way, that had I placed any credence in Satterly's statement, I would have felt that he might have been trying to exploit Remmer, and this, if anything, would have made me favor Remmer as being the victim of an attempt to exploit him when he was on trial. I make this statement by way of clarifying my feelings on the matter, but wish to state again that at no time did I place any credence in Satterly's statement, that I considered it a joke, and further that his statement in no way influenced me as a juror, and in no way caused prejudice or bias for either the defendant or the government. As a matter of fact, I had forgotten the incident until reminded of it by the above mentioned reporters.

I further wish to state that the fact that after I contacted Judge Foley, I was interviewed by the FBI agent, did not influence me in any way in the hearing of the evidence in the case or in arriving at a verdict. Again, the fact that the FBI agent

Defendant's Exhibit "B"—(Continued)

contacted me; did in no way create in my mind any prejudice or bias either for or against the defendant, and in no way affected my consideration of the evidence, or my vote in the jury room.

I have read this statement consisting of two pages —and to the best of my recollection it is true.

/s/ I. J. Smith

Witness: /s/ L. J. McGee, Special Agent FBI, Reno, Nevada.

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Recess taken at 12:00 noon.

Afternoon Session—June 7, 1954, 1:30 p.m.

IRVING J. SMITH

resumed the witness stand on further

Cross Examination

The Court: Proceed.

Q. (By Mr. Gillen): Mr. Smith, at the time that you had this talk with Mr. Satterly—I am referring now to the incident in your home in December of 1951—at that time, or at any time later, did it occur to you that Mr. Satterly might have been attempting to develop some sort of a deal wherein either you or he, or both of you, would profit, or, in other words, that this proposal or suggestion on the part of Mr. Satterly might have been a brain child of his?

(Testimony of Irving J. Smith.)

A. No, sir. If I had considered it seriously, I might have thought something like that, but I didn't consider it seriously.

Q. Did you ever express yourself as having entertained the thought that this might have been something created in the mind of Mr. Satterly and proposed to you to determine whether or not you would be susceptible or you would be willing to entertain such suggestion or go along with any sort of a deal?

A. I believe I made the statement to the representative of the FBI that had I thought this thing seriously, I would have thought that possibly Mr. Satterly was trying to make a deal for himself, but I didn't consider it anything serious. [51]

Q. Did you ever entertain the thought, or express yourself to any one as having entertained the thought, that this proposal may have been a serious one and may not have emanated from the defense side of the case?

A. I think it is set out very plainly, sir, in that report I gave to Mr. McGee of the FBI——

Q. Will you tell me now what your recollection is?

A. ——in which I said if I had thought it was serious, that it was a serious gesture, it might have influenced me to favor Mr. Remmer because if that was a serious thought and if he was concocting a deal for himself, or that I was sitting in the jury box and seeing Mr. Remmer every day, I believe

(Testimony of James A. Satterly.)

him concerning the fact that he was on the jury?

A. No, that is it.

Q. Did you ever have any conversation with Mr. Smith, in which he stated he was on the jury, according to your understanding?

A. No. I don't know how I come to know he was on there.

Q. Did you ever say anything to him, that you can recall now, to the effect, "Why don't you make a deal with Bones Remmer?" A. No.

Q. You don't recall that?

A. No, I don't.

Q. About how long were you at the Smith residence?

A. Oh, I would say a half hour, forty-five minutes.

Q. Did Mrs. Satterly join in any conversation with Mr. Smith at [70] the time you were discussing your affairs?

A. Just ordinary "Hello", "How are you?"

Q. Did she have any conversation with Mrs. Smith, do you know?

A. I think they were talking together.

Q. Did you talk to Mr. Smith about going hunting then or after you finished your business about insurance on your Hudson?

A. I don't know whether it was before or after.

Q. Can you remember about when you left the Smith residence?

A. What time in the evening, you mean?

(Testimony of Irving J. Smith.)

I would have felt that he might have been exploiting Mr. Remmer.

Q. You said that to the FBI man?

A. Yes, sir.

Q. And did you ever say to anybody that you thought that this was a proposal that may have emanated from the defense side of the case and therefore that affected your thoughts?

A. No, sir.

Q. Now following this incident with Mr. Satterly in your home in December of 1951, did you ride back and forth between Reno, Nevada and Carson City with other members of the jury?

A. Yes, sir.

Q. Who were the other members of the jury that you rode back and forth with usually? [52]

A. With Mr. Morris, Mr. Tinkham and Mrs. Mack.

Q. Any one else? A. No, sir.

Q. Now following this incident of December of 1951, did you, in the course of riding back and forth between Reno and Carson City, either coming to court in the morning or returning from court to Reno in the afternoon, discuss the case or any of its phases with your fellow jurors during the course of those rides? A. No, sir.

Q. Did any one of your fellow jurors ever admonish you, during the course of your travelling back and forth, that the case should not be discussed until all of the evidence had been heard and the

(Testimony of James A. Satterly.)

Q. Well, in relation to your discussion with him about your insurance and about going hunting?

A. Oh, I think it was right after I had the insurance figured out. It must have been after the conversation about hunting.

Q. And then you left after that, did you?

A. Yes, I did.

Q. Where were you then going?

A. Well, going to Tule Lake, but I stopped over at the Rip Van Wingle Auto Court and left during the morning.

Q. Did you leave Reno, Nevada, after you left the Smith home that evening?

A. No, I stayed out at the Rip Van Wingle Court.

Q. And left the next day?

A. Left the next day.

Q. And you have been gone from Nevada ever since that time, is that correct? [71]

A. I have. This is the first time I have been back since that time.

Q. How often would you say, during the years that you knew Mr. Smith, that you was *him* to visit him?

A. Once or twice a month, maybe once every three months, if I happened to see him on the street.

Q. With the exception of seeing him on the street and seeing him at the hunting club, the Greenhead Hunting Club at Fallon, were those the only occasions?

(Testimony of Irving J. Smith.)

case finally submitted to the jury, in accordance with what the judge had been telling you?

A. I think that each one of us expressed our views in that regard.

Q. Well, did any of your fellow jurors, on any of those rides express a view of that nature to you, by way of any admonition to you?

A. I have no recollection of such.

Q. Now during the course of your deliberations on this case, after the case had been submitted to you and after the judge's instructions and the jury had retired to the jury room for deliberations, was there any dispute arose among the jurors regarding the order of discussion in the course of the deliberations? [53]

The Court: I wouldn't want any questions concerning anything that is not appropo to the precise issue that the Supreme Court has remanded this case. I do not see that it is any concern of the Court what the deliberations of the jury were that were extraneous to this matter.

Mr. Gillen: I do not think we are going afield, your Honor, with this question. I think it has been shown, your Honor, that we are not going afield.

Mr. Graves: Your Honor, may the record show that the government objects on the grounds it is improper cross examination, is irrelevant, incompetent and immaterial.

The Court: I do not adhere to technical rules of examination because of the peculiar nature of the inquiry the Supreme Court has remanded to be

(Testimony of Irving J. Smith.)

made, but even so, I think there are limits, irrespective of the rules of cross examination, there are limits to the inquiry. I will sustain the objection.

Mr. Gillen: May I make one further observation, your Honor, on the matter. Your Honor has permitted, at least tentatively if not toto, the juror to express his opinion concerning his own state of mind regarding the defendant in that case, Mr. Remmer, and in view of that——

The Court: (Interceding) No, there was no such ruling [54] as that. For the reason I stated at the time, I allowed the witness to give his opinion as to whether this particular incident prejudiced him.

Mr. Gillen: That is correct. I probably put it awkwardly. Now the purpose of this question will develop certain facts which I believe would serve to contradict that contention on the part of the witness.

The Court: I do not see how the precise question would do that. If you have such an inquiry to make, I am not going to stop you from making it, but I do not think that this question will do that.

Q. Let me ask this, Mr. Smith—did any of the jurors demand that they be brought into court for further instruction by the Court because they accused you of arbitrarily taking away from them their free discussion and showing some prejudice upon your part?

Mr. Graves: To which the government objects, your Honor, as being beyond the scope of proper examination and this hearing.

(Testimony of Irving J. Smith.)

The Court: Yes, I will have to sustain the objection.

Q. Now, Mr. Smith, the jury retired on a Wednesday, did it not, for deliberation?

A. I don't recall the exact day.

Q. I think the record will show the jury retired on a Wednesday and returned its verdict on a Friday night. Is that correct? [55]

A. It could be.

Q. Now on Friday night, following the return of the verdict by the jury, I understood you to say that you were approached in the corridor outside of the building by some newspaper reporters, who questioned you concerning the incident with Mr. Satterly, is that correct? A. That is right.

Q. Did you inquire from them where they received their information, from whom they received their information, concerning the incident?

A. Yes, I did.

Q. Did you receive any information in that regard?

A. Now to the best of my recollection, I believe they said that they got it from Judge Foley. I am not right sure where they got their information. It might have been from some of the attorneys or from the judge.

Q. As I understood your testimony this morning, you said you were dumbfounded that they knew about the matter, and I believe you told them Judge Foley had the entire record and that they should see him.

(Testimony of Irving J. Smith.)

A. Yes, I was kind of astounded when they asked me because I did not recollect just exactly what had transpired.

Q. On that night did you return to Reno from Carson City with some other members of the jury?

A. Yes, sir.

Q. Those members were who?

A. Mr. Tinkham and Mrs. Mack.

The Court: That is the 22nd of February?

Mr. Gillen: Yes, your Honor.

Q. Whose automobile was being used on that occasion?

A. I believe it was Mr. Tinkham's automobile.

Q. It was true, was it not, that your automobile had been left at Mr. Tinkham's home, is that correct? A. At his home.

Q. And, it was your plan to return to Mr. Tinkham's home in Reno and pick up your automobile, is that correct? A. That is right.

Q. On arriving at Mr. Tinkham's home, something of an unusual nature was taking place, there was a fire in the garage, was there not?

A. That is right.

Q. And there was some few minutes' delay there and it is true, is it not, that you then got into your automobile with Mrs. Mack and took her to her home at 105 Gardner Street in Reno, is that right?

A. Yes, sir.

Q. The trips back and forth between Reno and Carson City, throughout the course of the trial, were on a share-expense basis, were they not? [57]

(Testimony of Irving J. Smith.)

A. Yes, sir.

Q. Now on arriving at Mrs. Mack's home at 105 Gardner Street that evening; did you and Mrs. Mack sit in the car for a minute and have a brief conversation? A. Yes, there was.

Q. And in that conversation Mrs. Mack asked you if she owed you any further expenses in connection with driving back and forth, isn't that true?

A. I don't recall.

Q. Is it true that you said to Mrs. Mack: "Thank you, Mrs. Mack, for your help in the Remmer case. Some day I will tell you why I was so interested, because you know I was under pressure." Did you say such a thing to her on that occasion?

A. No, sir.

Q. You deny that? A. I deny that.

Mr. Gillen: That's all.

## Redirect Examination

Q. (By Mr. Graves): Mr. Smith, you testified that, according to the date counsel gave you, December 15, 1953 was when Mr. Avakian interviewed you concerning the affidavit, is that correct?

A. Yes, sir.

Q. Now you have also testified that the affidavit was executed by you on January 30, 1954?

A. Yes, sir. [58]

Q. Do you know why that delay took place?

A. I told Mr. Avakian that I would give him an affidavit, because he had indicated to me that the government had, in submitting this case to the Supreme Court, had omitted the fact that there

(Testimony of Irving J. Smith.)

ever was a conference between Mr. Satterly and myself, or something like that. I said, "Well, that is not so. I will give you an affidavit to it; I will have to do so through my attorney", so I told Mr. Avakian who the attorney was and Mr. Avakian met with my attorney, not in my presence, and my attorney informed me that the affidavit which Mr. Avakian wanted to make out, that he wouldn't agree to any such affidavit, but that he had one that he would submit to me at my convenience, and it was due to the fact that Mr. Sidney Robinson was very busy at the time and had not prepared the affidavit.

Q. Did you ever see the proposed affidavit that was submitted by Mr. Avakian? A. No, sir.

Q. The only affidavit that you ever saw was the one that you signed? A. Yes, sir.

Q. Which was prepared after conference between your counsel and Mr. Avakian?

A. Yes, sir.

Q. Now in connection with the changing of the insurance from the Oldsmobile automobile of Mr. Satterly to the Hudson automobile [59] that he acquired, do you know whether or not you did change that insurance?

A. I am sure it was changed.

Q. So if you had changed that insurance, you would have made a record of it in your file, would you not? A. Yes, sir.

Q. Counsel asked you if you would produce such a record. Do you suppose after we recessed, between today and tomorrow, you could bring it into court?

(Testimony of Irving J. Smith.)

A. I might be able to.

Q. Now in connection with the time you were in Judge Foley's chambers, you told us that your best recollection is that it was during a morning recess, is that correct?

A. That is the best of my recollection.

Q. Do you have any recollection as to the approximate extent of that recess?

A. No, I don't.

Q. Do you know whether his Honor said, "We will be in recess for 15 or 20 minutes", something of that nature?

A. Well, it was something of that nature, yes.

Q. In relation to the durration of the recess, after you had your discussion with Judge Foley and you left the reception room of Judge Foley's, was there still some time between that time and the time you came back on the jury box?

A. Yes, probably there was. [60]

Q. So you didn't consume the entire recess time talking to Judge Foley and Miss Cooper?

A. No, sir.

Q. I think you also testified, in answer to a question by Mr. Gillen, that you could not actually recall whether or not Judge Foley gave you any admonition at the time you had your discussion with him, is that correct? A. That is right.

Q. Going back to the manner in which Mr. Satterly spoke to you in your home, would you say that his attitude, his manner, was a secretive one?

Mr. Gillen: Well, I think, if the Court please

(Testimony of Irving J. Smith.)

The Court: I think this matter has been gone into enough.

Mr. Graves: Very well, your Honor, I will withdraw the question.

The Court: This particular matter has been gone over several times.

Q. In answer to another question by Mr. Gillen, he asked you how you determined the remark was a joke and you said you could explain your reasons for that conclusion.

Mr. Gillen: I think counsel is misquoting me, your Honor. Undoubtedly he refers to me. I think that was a voluntary statement on the part of Mr. Smith. I do not think he was ever asked how he concluded it was a joke because I do not think [61] he ever answered he ever concluded it was a joke —it was uncertain in his mind for a number of reasons.

The Court: I think that is enough in the record on that question. I do not think the witness was asked how he concluded. He did make a statement if the attorney wanted his reasons, he could give them to him.

Mr. Graves: That is correct.

The Court: Well, I don't think that does anything for the record. We are only interested in facts.

Q. I believe, in answer to another question by Mr. Gillen, you stated that after Mr. and Mrs. Satterly left, and after you had discussed the matter with Judge Foley, then you wiped the matter

(Testimony of Irving J. Smith.)

from your hand until such time as the reporter spoke to you, is that correct? A. Yes, sir.

Mr. Graves: That's all.

Q. (By the Court): Mr. Smith, after the FBI agent called on you during the trial of the case, at that time until the verdict was returned, did you inform any of the members of the jury that you had been visited by an FBI agent?

A. Not to the best of my recollection.

Q. And did you inform any other person that you had been visited by an FBI agent during the course of the trial.

A. Not to the best of my recollection, sir. [62]

Q. You kept that to yourself?

A. Yes, sir. However, in my office there are several people in the office and he had to come through the office and go into the room.

Q. You mean by that some one might have seen him? A. They might have seen him.

Q. Did you convey any information to the members of your office staff that you had been visited by an FBI agent, from that time until the time of the verdict?

A. Not to the best of my recollection.

The Court: Anything else?

Recross Examination

Q. (By Mr. Gillen): Mr. Smith, after you reported the matter to Judge Foley, did I understand you to say, in answer to a re-direct examination question by government's counsel, that you wiped

(Testimony of Irving J. Smith.)

the matter from your mind until the newspaper reporter spoke to you at the conclusion of the trial?

A. Yes, sir.

Q. Now as a matter of fact, between the time that you reported the matter to Judge Foley and the time the newspaper reporter spoke to you, the time the verdict was returned, you had been interviewed by the FBI man, had you not?

A. Well, I mean with that exception, by the FBI man.

Q. Now with regard to this visit by the FBI man, was this FBI man known to be an FBI agent by the people sharing the office [63] with you in Reno?

Mr. Graves: If the Court please, we object on the grounds and for the reason it is immaterial, not within the scope of the issue here. It does not matter what they thought.

Mr. Gillen: I think it is further pursuing the inquiry your Honor had in mind.

The Court: No, my inquiry was whether or not any other member of the jury was advised an FBI agent visited the witness.

Mr. Gillen: It became public property that Mr. Smith had been visited by an FBI man in Reno.

The Court: How would this witness know that somebody else knew this was an FBI agent?

Mr. Gillen: Some other real estate broker might have said, "I see there was an FBI agent visited you."

The Court: Ask the question, whether or not he

(Testimony of Irving J. Smith.)

had any discussion with his office force and told them he had been visited by an FBI agent.

Q. Let me ask you then this, Mr. Smith—did any member of your office staff or office neighbors, whatever your arrangements were in your office, state to you that they recognized Mr. Callister and knew he was interviewing you and asked any questions of you? A. No, sir, they did not.

Q. Now you said Mr. Avakian had discussed with you some data or [64] some information to put into an affidavit, is that correct?

A. No, he didn't discuss anything with me that he wanted in the affidavit. He asked me if I would be willing to give an affidavit and I said yes.

Q. Then Mr. Avakian asked you for certain information to prepare that affidavit, did he not? I mean, Mr. Avakian didn't conjure the affidavit up out of his mind? He got information for the affidavit from you?

A. Yes, he asked if I had had an interview with Mr. Satterly. I don't believe the word "Mr. Satterly" was mentioned, but if I was interviewed by a gambler, and I said it actually did happen.

Q. And then he said he wanted to prepare an affidavit and you told him you wanted to submit it to your attorney? A. Yes.

Q. You never saw, as I understand, the form of affidavit prepared by Mr. Avakian?

A. No, sir.

Q. And Mr. Avakian's form of affidavit then was

(Testimony of Irving J. Smith.)

not rejected by you, but rather by your attorney, Mr. Robinson? A. Yes, sir.

Mr. Gillen: That's all.

Mr. Graves: No questions. [65]

JAMES A. SATTERLY

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. James A. Satterly.

Q. Where do your live, Mr. Satterly.

A. St. Helens, Oregon.

Q. How long have you lived in St. Helens, Oregon? A. About the middle of January.

Q. Of this year? A. This year.

Q. Are you married, Mr. Satterly?

A. Yes.

Q. What is your wife's name?

A. Evelyn.

Q. And prior to your moving to Oregon, where did you reside? A. Pierce, Idaho.

Q. How long did you reside there?

A. Nearly two years.

Q. And before you went to Pierce, Idaho, where did you reside?

A. That was in Reno, six or seven years.

Q. Where did you live in Reno?

A. 731 West Pueblo Street.

(Testimony of James A. Satterly.)

Q. How long had you lived at that address in Reno? A. Two or three years. [66]

Q. At that time was Evelyn Satterly your wife?

A. Yes.

Q. What was your business or occupation when you lived in Reno? A. Dealing craps.

Q. Where were you dealing craps?

A. Been about three years in the Tropics Club and now it is the Downtown.

Q. That is in Reno proper. Where else did you work? A. In the Town House.

Q. In Reno, Nevada? A. Yes.

Q. In both places you worked at a crap table?

A. Yes.

Q. Are you acquainted with Irving J. Smith?

A. Yes.

Q. How long have you known Mr. Smith?

A. Going on four or five years.

Q. You have known him that long to this time?

A. I don't know—whenever it was we bought the house from him. It must be six or seven years.

Q. Was your first occasion for meeting Mr. Smith when you purchased your home in Reno?

A. That is right.

Q. In other words, was he the real estate broker that handled the transaction? [67]

A. That's right.

Q. Have you had any other dealings with Mr. Smith? A. Yes, car insurance.

Q. How well do you know Mr. Smith?

(Testimony of James A. Satterly.)

A. Pretty well. We used to go hunting with him.

Q. Who do you mean by "we"?

A. My wife and I.

Q. Where did you go hunting?

A. At the Greenhead Club.

Q. Were you a member of the Greenhead Club?

A. Had to buy tickets every time you go down.

Q. And your wife would go with you on those occasions? A. Yes, sir.

Q. Would you go with the Smiths or meet them there, or how did you see them?

A. Generally met and sometimes come back together.

Q. Was it a planned meeting or a chance meeting, do you remember?

A. Oh, I guess you would call it a chance meeting.

Q. Are you acquainted with the defendant, Elmer Remmer, known as Bones Remmer?

A. I just know the man when I see him.

Q. Now directing your attention to December of 1951, did you have occasion to go to the home of Mr. Irving J. Smith? A. Yes, sir. [68]

Q. And did you go to Mr. Smith's home, did you say? A. Yes, I did.

Q. Who was with you, if anyone?

A. My wife.

Q. And when you arrived there, who was present, do you know?

A. Just Mrs. Smith and Mr. Smith.

(Testimony of James A. Satterly.)

Q. And did you have any conversation at that time with Mr. Smith?

A. We talked about guns and then I asked him about insurance for my Hudson automobile. Had an Oldsmobile before that.

Q. You had an Oldsmobile before, but now you had a Hudson, is that it? A. Yes.

Q. And you asked Mr. Smith to transfer your insurance? A. That is right.

Q. Can you remember the exact words of the conversation that you had? A. No.

Q. Where were you in his house at the time you had this conversation with him?

A. In the front room, the living room.

Q. And where were the other people in the room?

A. Sitting here and there around the room; I didn't notice.

Q. Now did you do any other business with Mr. Smith, other than your insurance, at that time?

A. No.

Q. Do you recall any other conversation you had with him at that time? A. No.

Q. Do you recall any conversation with him concerning the trial of the United States of America vs. Elmer F. Remmer that was then going on?

A. It seems like I asked him if he could get off that trial a few days to go hunting. He said, "I am not allowed to talk about the trial at all because I am on the jury." That is all that was said I know of.

Q. Did you ever have any conversation with

(Testimony of Mrs. Irving J. Smith.)

Q. Do you have any idea approximately about how long they were at your home?

A. Oh, possibly three-quarters of an hour.

Q. How well do you know Mr. and Mrs. Satterly?

A. Well, I hadn't met the Satterlys for quite a long time after [87] my husband. He met them through business and I think, if I remember correctly, I met Mr. Satterly before I did her. I think I met Mrs. Satterly when we were hunting, we met them at the hunting club.

Q. What club is that you refer to?

A. The Greenhead.

Q. The Fallon Club? A. Yes.

Mr. Graves: You may cross examine.

Cross Examination

Q. (By Mr. Gillen): Mrs. Smith, after the Satterlys left your home, did you inquire of your husband regarding his remark to Mr. Satterly that had attracted your attention and the fact that he raised his voice?

A. No, sir, I did not. My husband did not talk to me about the trial or anything pertaining to it.

Q. When the Satterlys left, did you say to your husband, "What did Mr. Satterly say to you that caused you to say you were on the jury and couldn't discuss the case"? A. I did not.

Q. Did you say anything to him? A. No.

Q. Were you interviewed by an agent of the Federal Bureau of Investigation?

(Testimony of Mrs. Irving J. Smith.)

A. Not until about a month or six weeks ago.

Q. Did you ever meet a Mr. Callister from the Federal Bureau of Investigation?

A. No, sir, I don't know the name. I think it was Mr. McGee, the FBI man.

Q. After the Remmer verdict had been returned and your husband had returned to his home and something came out in the newspapers about this incident at your home, did you and your husband discuss it?

A. We might. My husband was tired and said he wasn't interested in talking about anything.

Q. Is that your best memory, that you might have discussed it with your husband after the case was over and the articles were in the newspaper?

A. Well, I gave him the newspaper, I clipped all the items from the paper before he came home and kept them in a scrapbook of what I read, but I did not talk about it to him and he did not mention it to me.

Q. You just handed him the scrapbook.

A. After the trial was over.

Q. You don't remember now whether you even at that time said to him, "What was this all about you reported to Judge Foley about Mr. Satterly", and all those things?

A. We might have discussed it later, I don't think we did right after the trial.

Q. You don't have any distinct recollection of ever having [89] discussed it?

(Testimony of James A. Satterly.)

A. Only one more—when I sold my home I had him check it over.

Q. And that is the house you referred to on West Pueblo Street, Reno? A. Yes.

Q. Did you and Mr. Smith ever kid each other and joke together? A. All the time.

Q. Who would kid whom?

A. Vice versa.

Mr. Graves: You may examine.

Cross Examination

Q. (By Mr. Gillen): Mr. Smith, did I understand you to say that on the night you went to Mr. Smith's house to discuss with him the automobile insurance, that you were all packed up and expected to leave Nevada? A. Yes.

Q. You were all packed up, lock, stock and barrel, and going to [72] leave Nevada?

A. That's right.

Q. Your automobile was loaded?

A. Except what we were going to use that night.

Q. Were you on your way out of the State when you stopped off at Mr. Smith's house in Sparks?

A. No, that was in the evening, seven or eight or nine o'clock and the next morning we drove out of Reno north to Tule Lake.

Q. Did you have any other reason to go to Sparks other than to see Mr. Smith on that night?

A. No.

Q. Your sole purpose in seeing Mr. Smith that

(Testimony of Mrs. Irving J. Smith.)

A. Not enumerating any particulars pertaining to it.

Q. It did not pique your curiosity at all?

A. No, the judge said they weren't to talk about it.

Q. I mean this was after it was all over, was your curiosity piqued then?

A. We probably talked about it, but I don't remember any particulars to that particular point any more than the others.

Q. Did you avoid talking about it because it appeared to you that your husband was disturbed about it?

A. No, sir, I don't think he was disturbed about it.

Q. Did you ever ask him if he was ever disturbed about it?

A. I don't remember asking him.

Mr. Gillen: That's all.

Mr. Graves: No further questions.

JUDGE ROGER T. FOLEY

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Roger T. Foley.

Q. Where do you live, Judge Foley?

A. In Las Vegas, Nevada.

(Testimony of James A. Satterly.)

night was merely to have him transfer your automobile insurance from one car to another?

A. That's right.

Q. Have you ever transacted any business like that with Mr. Smith by telephone on other occasions? A. No.

Q. You felt that you should go personally to see Mr. Smith about it, is that right?

A. It was after office hours.

Q. Well, hadn't you ever talked to Mr. Smith on the telephone at his home?

A. I don't know whether I called him up that night to see whether he was home before I went there or not. [73]

Q. Now you were planning on leaving Nevada for good, permanently? A. Yes.

Q. And you did leave Nevada permanently, so far as ever being here since that time?

A. Yes.

Q. And you did that the very next day?

A. The next morning.

Q. Did you say it is your recollection that you said to Mr. Smith—I think your words were—"It seems like I asked him if he could get off the trial for a few days—" or "in a few days, to go hunting."

A. I said if he got off the case in a few days, I would stay over and go hunting with him. He said he couldn't talk about it.

Q. Then your proposal was that even though you were still leaving the State for good the next

(Testimony of Judge Roger T. Foley.)

Q. And you have official connection with the United States government, sir?

A. Yes, sir. [90]

Q. Please state it.

A. As a witness and as a judge of this court.

Q. And as a judge of this court, did you conduct the trial of the United States of America vs. Elmer F. Remmer? A. Yes, sir.

Q. During the course of that trial did you, on one occasion, have a conversation with one of the jurors, Mr. Irving J. Smith? A. Yes, sir.

Q. Will you please state, if you can, when that took place?

A. I will refer to the transcript of the note made by my secretary on that occasion. The note shows that December 20, 1951, at 11:05 a.m.

Q. And may we for the record, have the name of your secretary? A. Miss Martadel Cooper.

Q. Will you please state who was present at that time?

A. Miss Cooper and Mr. Smith and myself. I have no recollection of any one else being present.

Q. And was that during the morning recess of the trial? A. I assume so.

Q. From the time?

A. Just from the time.

Q. Now will you please state the conversation.

A. I would like better to refer to the notes. Mr. Smith came in and made a statement to me and I called in Miss Cooper and had him repeat this statement and here it is, the substance is. [91]

(Testimony of James A. Satterly.)

morning, if Mr. Smith could get off his jury duty for a few days, you would remain over.

A. I would remain over that day.

Q. To go hunting? A. Yes.

Q. And as soon as you said that, did Mr. Smith say to you, "I am not permitted to discuss anything about the case"? A. Yes.

Q. You maintain now that you didn't discuss anything about the case—you merely asked him if he would have time to go hunting with you, isn't that correct? [74] A. Yes.

Q. Did you tell Mr. Smith that you knew Mr. Remmer? A. No, I did not.

Q. As a matter of fact, you don't know Mr. Remmer personally, only when you see him, is that true? A. Yes.

Q. That was the case then and is the case now, isn't that correct? A. Yes.

Q. And when Mr. Smith said to you, "Well, I am not supposed to discuss the case", did you say, "I am not discussing the case with you, I am merely asking if you will have time to go hunting"?

A. I never said any more to him.

Q. Did you say to Mr. Smith: "I know Remmer", did you say that to Mr. Smith?

A. No, I did not.

Q. Did you say to Mr. Smith: "If you string along with Bones, you can make a lot of money for yourself", or "you can make money for yourself", or "you can do yourself some good", or anything to that effect?

(Testimony of Judge Roger F. Foley.)

sold a house to a party, Jim Slattery, years ago. Carried their insurance with him. (That is, Mr. Smith) Came over to his house. (That is, Mr. Smith told Miss Cooper that Mr. Slatterly came over to Mr. Smith's house.) He had a wreck with his car. When he came in he said—this is Mr. Smith speaking: "I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?" Reminded him that he wasn't to talk about the case. The man shut up.

Q. You say you reminded him, meaning Mr. Smith, not to talk about the case?

A. No, Mr. Smith reminded this Mr. Slatterly that Mr. Smith was not to talk about the case and that the man shut up.

Q. Now did you have any further conversation with him then? A. With Mr. Smith?

Q. Yes, sir?

A. Yes, I did. I recollect saying to Mr. Smith that this sounded as he had stated, he thought the man was joking, and I agreed no doubt that was the situation, and I further stated, I said, "Even if he wasn't joking, you shouldn't hold that matter against the defendant Remmer, because it could very well be that some busybody might be trying to work his way into the case somewhere, and without any knowledge on the part of Mr. Remmer at all", but I did believe; and I told him I thought it was merely a passing remark that this man made. That is the extent of the conversation that I recall. [92]

Q. Did you have any further conversation with

(Testimony of James A. Satterly.)

A. I don't remember saying one word like that. If I had of said it, it was all in fun and I wouldn't remember it if I had said it.

Q. You heard Mr. Smith testify here today, did you not? [75] A. Yes.

Q. And you heard Mr. Smith testify that you stated to him that you knew Mr. Remmer, that if he strung along with Mr. Remmer as a juror, that he could do himself some good, and that Mr. Smith said he didn't recall whether you actually used the word "money" or not, but you gave him that impression, you heard that? A. That is right.

Mr. Graves: I don't think that is correct.

The Court: It isn't quite accurate, but I take it the witness was here and heard what was said.

Mr. Gillen: I think there were several occasions and it is a summation.

Mr. Graves: I don't know whether or not this witness was here this morning. Were you in the courtroom this morning?

Witness: Yes.

Mr. Graves: I am sorry.

The Court: You can ask him again.

Q. Well, let me withdraw my other question and ask you this—you heard Mr. Smith testify this morning, both on direct and cross examination, did you not? A. Yes, I did.

Q. And you heard him quote what he contended to be his best recollection of approximately what was said by you to him in his home on a night in December, 1951? A. I remember. [76]

(Testimony of Judge Roger T. Foley.)

him at that time, the fact he shouldn't mention it, or anything of that nature?

A. I do believe I did advise Mr. Smith not to mention this matter to any one.

Q. And after that did Mr. Smith leave?

A. Yes.

Q. And altogether, Judge Foley, how long would you say it took?

A. Well, I don't imagine it would take altogether more than fifteen minutes.

Q. It didn't take the entire recess?

A. Well, to say whether that was recess time or not—it evidently must have been because it wouldn't have been in my chambers.

Q. After Mr. Smith left your chambers—was this in the reception room or your office or Miss Cooper's office?

A. In the main office, in chambers.

Q. After he left, did you at any time then take any further action or discuss this interview that you had with Mr. Smith with any one else?

A. I discussed it with Mr. Thompson, the United States attorney's office.

Q. That was Mr. Bruce Thompson?

A. Yes.

Q. Do you remember about when that was, Judge? [93]

A. Probably a day or so afterward.

Q. Where did that conversation and discussion take place?

A. In the same place, in chambers.

(Testimony of James A. Satterly.)

Q. And with particular reference to what he said concerning the Remmer case, in which you were supposed to have said to him, "Why don't you do yourself some good by stringing along with Mr. Remmer", does that statement which Mr. Smith said refresh your recollection as to your having said any such thing to him? A. No, it don't.

Q. Now, Mr. Satterly, were you interviewed at any time by an agent from the Federal Bureau of Investigation? A. About 30 days ago.

Q. Is that the first time you were interviewed by any agent of the Federal Bureau of Investigation? A. That is right.

Q. Was that by a man by the name of McGee?

A. No, I think it was Benton, something like Benton.

Q. Where were you found to be interviewed, in Oregon? A. In St. Helens, Oregon.

Q. And did this Federal Bureau of Investigation agent show you his identification card?

A. Yes.

Q. Did you make a statement for him?

A. Well, I didn't sign any statement. I told him if it was necessary I would and he said it was not necessary.

Q. Did he write down what you told him?

A. I guess he did. I didn't see what it was.

Q. And you never signed anything, but you told him you would? A. That's right. [77]

Q. You can't tell us what that agent's name is now?

(Testimony of James A. Satterly.)

A. I think it was Benton, something like that; I am not sure.

Q. By the way, did you receive a new policy from Mr. Smith, or rider changing the insurance from one automobile to another?

A. Yes, I did.

Q. Where was that sent to you?

A. I think I was in Idaho. It was sent to me and a few months later I cancelled it.

Q. It was sent to you while you were in Idaho and cancelled subsequently?

A. I took out local insurance up there.

Q. A federal agent or FBI agent by the name of Callister, did he ever interview you?

A. Not that I know of.

Q. (To Mr. Callister—Would you be kind enough to stand up?) Do you recall being interviewed by this gentleman now? This is the Federal Bureau of Investigation Mr. Callister.

Q. I do not remember having seen him until this morning.

Mr. Gillen: May I ask the government counsel, through your Honor, if we may be furnished with the name of the agent who interviewed Mr. Satterly at St. Helens, Oregon?

The Court: You may ask him.

Mr. Gillen: We were wondering whether we might have that man's name or whether or not counsel will tell us if he is to be produced as a witness. [78]

Mr. Graves: Your Honor, we do not think such

(Testimony of James A. Satterly.)

an inquiry is proper. There is no basis for it. As your Honor says, there is no reason——

The Court: (Interceding) There is no good reason for it.

Mr. Gillen: It is my understanding of government counsel's position that he is completely a neutral party here, going into an inquiry.

The Court: I do not see what you are getting at, counsel. The Supreme Court set the burden on the government to present evidence negativing the presumption which they have established as a matter of law, so he has to go and get evidence together, so he interviews a witness. What difference does it make? I have enough to do to decide this point without going into all that.

Mr. Gillen: That is all.

Mr. Graves: No questions.

MRS. EVELYN SATTERLY

being duly sworn, testified on behalf of the government as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Evelyn Satterly.

Q. Are you the wife of James A. Satterly?

A. Yes, sir. [79]

Q. How long have you been married to Mr. Satterly? A. Since 1935.

Q. Where do you live, Mrs. Satterly?

A. Right at the time at St. Helens, Oregon.

(Testimony of Mrs. Evelyn Satterly.)

Q. And did you at one time live in Reno, Nevada? A. I did.

Q. And when?

A. Oh, about two or three years ago.

Q. And at the time you lived in Reno, where did you reside? A. 731 West Pueblo.

Q. Are you acquainted with Mr. and Mrs. Irving J. Smith? A. I am.

Q. Do you recall when you first met them?

A. I do not.

Q. Do you know whether or not you purchased your home in Reno through Mr. Smith's real estate office? A. We did.

Q. Did you have occasion to meet him at that time? A. Yes.

Q. And did you meet Mrs. Smith at that time too?

A. I don't recall the first time I met Mrs. Smith.

Q. How often, if you can remember, did you see the Smiths?

A. I don't remember that. I saw them on business on many occasions.

Q. Do you ever recall meeting them at the Greenhead Hunting [80] Club in Fallon?

A. Yes, sir.

Q. In connection with the evening in December, 1951, did your have occasion to go to their home with your husband? A. I did.

Q. What was the reason for that?

A. That was about some insurance papers.

(Testimony of Mrs. Evelyn Satterly.)

Q. And do you know what those insurance papers involved?

A. Pertaining to an automobile.

Q. Were you trying to transfer insurance from one car to another, is that the reason you went?

A. I was not transferring anything; it was my husband's business.

Q. Mr. Smith takes care of all the business in your household? A. Not necessarily.

Q. But on this particular occasion he did, is that correct? A. I don't understand.

Q. I say on this particular occasion Mr. Satterly took care of the business?

A. The insurance was in Mr. Satterly's name and it was his business to attend to it.

Q. When you arrived at the Smith residence, do you know about what time it was?

A. I have no occasion to remember. I do not know.

Q. Was it in the morning or evening? [81]

A. It was some time in the evening.

Q. Who was present?

A. Mr. and Mrs. Smith, Mr. Satterly and myself.

Q. And when you got there, what did you do?

A. We merely sat down and talked.

Q. Who did?

A. The parties that were present, Mr. and Mrs. Smith and myself and Mr. Satterly.

Q. Did you talk to Mrs. Smith while Mr. Satterly was talking to Mr. Smith?

(Testimony of Mrs. Evelyn Satterly.)

A. Well, I wouldn't say; it was a mixed conversation, everybody was in the room. I couldn't repeat the conversation.

Q. This was a rather large room?

A. I wouldn't say so. It was quite well furnished. I wouldn't call it a large room.

Q. Were you sitting with Mrs. Smith at one end of the room? A. I was sitting at one end.

Q. Can you remember the conversation that took place while you were there?

A. We discussed insurance and guns and hunts and various things pertaining to hunting, and insurance and weather, and like one does discuss with casual friends.

Q. Was there any joking going on?

A. My husband always joked.

Q. Do you consider him a joker? Now did you have any discussion, [82] did any conversation come up at that time concerning the pending case of the United States of America against Elmer F. Remmier? A. I did not.

Q. You don't recall anything of that kind?

A. I do not.

Q. You have been present in court during the hearing all day? A. I have.

Q. Did you hear the testimony of Mr. Smith?

A. I did.

Q. You also heard the testimony of your husband? A. I did.

Q. Do you at this time have any independent recollection of any conversation involving Mr. Rem-

(Testimony of Mrs. Evelyn Satterly.)

mer? A. I didn't pay too much attention——

Mr. Graves: Will you read the question?

(Question read.)

A. I do not.

Q. At the time you went over to the Smith residence and discussed this insurance, were you preparing to leave Nevada?

A. When you say "preparing", I do not quite understand that.

Q. Had you sold your home in Reno?

A. We had sold our home.

Q. Had you packed your car?

Q. I don't remember whether the car was packed or wasn't. I [83] have no reason to remember.

Q. Do you remember any discussion at all between Mr. Satterly and Mr. Smith in respect to going hunting if Mr. Smith were available?

A. I do believe that I remember something, but I can't state word for word, that Mr. Satterly said, "When you have finished with whatever you are doing, we could go hunting" and I think that was more or less a joke too.

Q. As a matter of fact, do you remember when you left Reno? A. I do not.

Q. Do you remember when you left Reno in relation to that particular conversation that evening? A. I do not.

Q. You do not know whether it was the next day or not? A. I do not.

Q. Were you in the habit of going hunting frequently with your husband?

(Testimony of Mrs. Evelyn Satterly.)

A. I wouldn't say I always went. I usually went.

Mr. Graves: You may cross examine.

Mr. Gillen: No questions.

## MRS. IRVING J. SMITH

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Dorthea Adele Smith. [84]

Q. Where do you live, Mrs. Smith?

A. 175 Grove Street, Reno.

Q. How long have you lived in Reno?

A. Well, we have lived in Reno altogether about 31 or 32 years, I believe. On Grove Street, we have only been there a few months.

Q. You are the wife, are you, of Mr. Irving J. Smith? A. Yes.

Q. Do you recall the time that your husband was on the jury in the case of the United States of America vs. Elmer F. Remmer? A. I do.

Q. Do you recall one evening during the progress of that trial Mr. and Mrs. James A. Satterly came to your home? A. Yes.

Q. At that time where were you living?

A. 974 Fifth Street in Sparks.

Q. Do you remember what time of day it was they came to your home?

A. It was in the evening.

(Testimony of Mrs. Irving J. Smith.)

Q. Who were present at your home?

A. My husband and Mr. and Mrs. Satterly and myself.

Q. Will you tell us please, to the best of your recollection, what took place?

A. Well, they came in and stated primarily to see my husband about insurance on the automobile, wanted to change automobiles, [85] and my husband and Mr. Satterly were sitting at one end of the room and I and Mrs. Satterly sitting at the other end of the room and they were talking about the insurance and Mrs. Satterly and I were engaged in conversation about different things. I remember particularly talking about their dogs and hunting. Do you want me to go on?

Q. I want you to tell us what was said, to the best of your recollection.

A. We were talking and the only thing I heard, my husband's voice was raised and he said something, "You know I am on the jury. We may not talk about the trial", or "the judge has given instructions to the that we are not to talk about this case"; and I stopped to listen to what they were saying, because I was conscious of his voice being raised, and Mr. Satterly laughed, and that was all I heard. I didn't hear what Mr. Satterly said to my husband.

Q. During the time, up to that point, when the Satterlys were at your home, you and Mrs. Satterly were engaged in conversation at one end of your living room?

(Testimony of Mrs. Irving J. Smith.)

A. Yes. We have two Chesterfields, we were on one end and Mr. Satterly and Mr. Smith the other.

Q. Is that a straight room?

A. Yes, quite a long room.

Q. And during your conversation with Mrs. Satterly, you say it was strictly about dogs and generalities? [86] A. Yes.

Q. You had no discussion about the trial?

A. No.

Q. You testified Mr. Satterly was talking to Mr. Smith about insurance. Did you hear such conversation?

A. Well, when he first came in he told us he came for that purpose and, of course, we started in talking about it.

Q. And then between that point and the point where you heard your husband raise his voice, you heard none of the conversation between Mr. Satterly and Mr. Smith, is that correct?

A. No.

Q. After you did hear your husband raise his voice and you heard Mr. Satterly laugh, what happened then?

A. Well, it was toward the close of the visit; we got together and conversed for a few minutes and they left. I guess they had culminated their business and we all sat down and talked for a few minutes, possibly about a minute, I don't remember.

Q. But in any event you had no discussing during that time about the trial? A. No, sir.

(Testimony of Judge Roger T. Foley.)

Q. Do you recall at this time whether any one else was present then?

A. Mr. Campbell might have been present and there might have been another gentleman who was assisting the government present, for the Internal Revenue.

Q. Now Mr. Campbell, for the record, Judge Foley, was attorney for the Internal Revenue, was tax counsel?

A. I know he was for the Internal Revenue, I don't know just what his title was.

Q. And the other man to whom you refer would be Mr. Shelton? A. I think so.

Q. Where did this next conversation take place?

A. In my chambers.

Q. Will you please state what the conversation was?

A. The substance of it was that we considered the propriety of having an investigation made, to see if this individual who talked to Mr. Smith had some purpose in making this remark, or whether it was merely a passing remark, and the question then arose as to whether or not we should confer with the defense. It was the opinion, I think, that we believed that this was just a joke, that it should be investigated, to see if the man Slatterly was attempting to interfere with the progress of that [94] trial in any way, so then we considered whether or not we should mention that to the defendant's attorneys. We concluded if there was a possibility here that somebody connected in the case, in the

event it was true, suppose it was true, that the defendant or his counsel were attempting to influence that jury, any effort to make an investigation would be frustrated. Now that is the story and not one believed that the defendant did have any connection with it, but we wanted an investigation to make sure; to see what this man Slatterly was after, whether it was just a joke or whether it was serious.

Q. Did you afterward instruct Mr. Thompson to make such investigation?

A. The next I remember a member of the FBI called on me in my chambers in Reno and I can recollect telling that gentleman, who he was I don't know now——

Q. Do you remember whether or not it was Mr. Callister of the FBI?

A. It might have been, but my recollection is I told him I thought the whole matter was a joke, and then another member of the FBI, or maybe the same member, later on told me that they had contacted this individual in Oregon and that we were right, it was just nothing but a passing remark, and that is the whole thing now as it appears to me.

Q. That last statement, that Mr. Slatterly had been contacted in Oregon, that was how much after, in point of time, the original [95] conversation?

A. I don't know how long it was. It was sometime after.

Mr. Graves: You may cross examine.

The Court: We will take a short recess.

(Testimony of Judge Roger T. Foley.)

(Recess taken at 2:50 p.m.)

3:05 p.m.

Judge Foley resumed the witness stand on

Cross Examination

Q. (By Mr. Gillen): Judge Foley, did I understand you to say that you had refreshed your recollection about this incident by referring to a memorandum that was made at the time?

A. No, you did not. I don't know what you understood, but I didn't say that.

Q. Well, you made reference to a memorandum that was made.

A. But you remember what the question was—you asked me the date and I looked at it to find the date.

Q. I see, and the date, as I recall, was the 20th of December, 1951, is that correct, at 11:05 in the morning, that is what I put down.

A. Thursday, December 20, 1951.

Q. May I ask, Judge, was that memorandum that you referred to, was that a memorandum you made yourself or was that Miss Cooper's memorandum?

A. I called Miss Cooper in and requested Mr. Smith to repeat the statement he made to me in her presence and this is her note [96] of it.

Q. You made no memorandum yourself this morning? A. None whatever.

Q. May I see that memorandum?

(Testimony of Judge Roger T. Foley.)

A. Yes, sir. That is a copy of the transcript of her notes.

Q. I see, Judge, let me ask you, so far as you know, is this the extent of what Miss Cooper took down? A. I believe it was.

Q. There was no other memorandum?

A. I do not think there was another memorandum connected with my court.

Q. That you know of. All right. I would like to offer this, may it please the Court, as exhibit next in order.

Clerk: Exhibit C.

## DEFENDANT'S EXHIBIT "C"

(Copy)

Thursday, December 20, 1951, Carson City, Nevada, 11:05 a.m., in Judge Roger T. Foley's Chambers.

Juror Smith:

Sold a house to a party (Jim Slatterly) years ago. Carried their insurance with him. Came over to his house. Had a wreck with his car. When he came in he said, "I know Bones Remmers; you are a member of the jury; why don't you make a deal with him?" Reminded him that he wasn't to talk about the case. The man shut up.

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Q. I note, Judge Foley, that Miss Cooper's memorandum refers to the man who spoke as Mr. Jim Slatterly. It appears that the man was a Mr.

(Testimony of Judge Roger T. Foley.)

James Satterly. May I ask, Judge, are you acquainted with Mr. Satterly? A. No, Sir.

Q. I take it, from Miss Cooper's notes, then, that not being acquainted with Mr. Satterly, you assumed that the name "Slatterly", was correct?

A. I didn't use the name at all. The contents of that note was taken from the statement made by Mr. Smith. I made no effort to repeat it. [97]

Q. My question was, you assumed that that was the correct name that Mr. Smith mentioned, that appeared in Miss Cooper's notes?

A. No, I don't. I don't know anything about it—what you see in that note, that's all.

Q. It didn't cross your mind whether Mr. Smith said Slatterly or Satterly?

A. No, at this time I wouldn't know whether it was Slatterly or any other name.

Q. As I recall your testimony, Judge, it was to the effect that the Federal Bureau of Investigation agent subsequently reported to you that the man who had talked to Mr. Smith had been contacted and interviewed in Oregon?

A. That is what I understand, Mr. Gillen. It is my recollection now that some time afterward one of the gentlemen connected with the FBI—which one it was I cannot even tell you—came into my office in Reno and said that that was just an idle statement made by this man.

Q. This agent reported to you personally?

A. He came into chambers.

(Testimony of Judge Roger T. Foley.)

Q. And was that while the Remmer trial was still in progress?

A. That I don't recall. I really don't recall.

Mr. Gillen: I wonder if I might impose on Mr. Callister to stand up again.

Q. Do you recall whether it was agent Callister?

A. I doubt that it was. [98]

Q. Are you acquainted with Agent McGee from the Federal Bureau of Investigation?

A. My thought was it was Ford Holmes. That is just my recollection. I do not believe it was Mr. Callister. It could have been Mr. McGee.

Q. And you can't tell us now, Judge, whether it was during the course of the trial that this was reported to you as being a closed incident, or after?

A. No, I can't.

Q. Do you recall, Judge, whether you ever mentioned to Mr. Smith that the matter had been run down, that the man in Oregon had been contacted and interviewed, and that the investigators had agreed this was a facetious remark and wasn't serious?

A. I couldn't answer that because I have no recollection.

Q. You can't remember: I see. Just a moment please. I think that is all, thank you.

Redirect Examination

Q. (By Mr. Graves): Just one question, Judge Foley. In connection with juror Smith, you only saw him on that one occasion, did you not?

(Testimony of Judge Roger T. Foley.)

A. I answered Mr. Gillen, I said I couldn't recollect. I really can't say whether I had any communication with Mr. Smith after that or not.

Mr. Graves: That's all.

The Court: Before Judge Foley leaves the stand, I want to say that I do not approve the idea of the [99] policy of a federal judge being asked to take the witness stand in connection with a judicial proceeding which he has conducted, and Judge Foley has consented, apparently at the request of the United States attorney, to appear as a witness in this proceeding, in a case in which he presided over as judge, and I do not believe that this should be allowed to go unnoted; so that it might become a precedent for summoning of judges to testify in cases in which they presided. The only matter that is before this Court is the impact upon the jury of the proceedings which took place. Therefore, I want to note for the record my own view, that in my opinion it was improper to request the Judge to appear and testify concerning a matter that could pertain to his conduct of the trial of the case. There are ways of taking care of errors that we sometimes, and frequently, commit, but not by this practice, and I want also to state that I think it was far more than generous on the part of Judge Foley to consent to testify in this matter. It could all have been covered in the record by a statement concerning it. [100].

MARTADEL COOPER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name, please? A. Martadel Cooper.

Q. Where do you live, Miss Cooper?

A. Presently right now I am living in Reno.

Q. Reno, Nevada? A. Yes, sir.

Q. And do you have an official position with the United States government?

A. Yes, I am secretary to the United States Judge, Roger T. Foley.

Q. And in connection with those duties, how long have you been so employed?

A. Nine years.

Q. Directing your attention to December 20, 1951, do you have a recollection of having seen a Mr. Irving J. Smith, who was one of the jurors in the trial of the United States of America vs. Elmer F. Remmer, come into Judge Foley's chambers?

A. Well, I really don't remember Mr. Smith right now.

Q. Do you recall any time during the trial of the Remmer case that you were called upon by Judge Foley to take some notes concerning his visitation by a juror? A. Yes, sir. [301].

A. From my notes, I have it marked what the juror said.

(Testimony of Walter M. Campbell.)

A. The first information of anything I had was after the trial was over.

Q. The day following the trial?

A. I am not sure; it might have been.

Q. Did any press representative tell you where they obtained their information about the matter?

A. No, sir.

Mr. Gillen: I think that is all.

## T. HIRAM CALLISTER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please?

A. My name is T. Hiram Callister.

Q. And where do you like, Mr. Callister?

A. In Reno, Nevada.

Q. How long have you lived in Reno, Nevada?

A. For approximately three years.

Q. Do you have an official capacity with the United States? [108] A. I do.

Q. Please state.

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been employed in such capacity?

A. A little more than twelve years.

Q. Drawing your attention to December of 1951, did you have occasion to make an investigation

(Testimony of T. Hirami Callister.)

concerning Mr. Irving J. Smith and one Mr. Satterly? A. I did.

Q. Please state the circumstances under which you acted.

A. At approximately 8:40 a.m. on December 21st, I received a telephone call from Mr. Bruce Thompson, the then Assistant United States Attorney at Reno, Nevada. He requested that I come to his office and when I came to his office he told me that Mr. Smith had reported to Judge Foley that an individual made a statement to him which had caused him to report the possibility of an improper approach to a juror, and Mr. Thompson advised me that Judge Foley had requested that the FBI conduct an investigation relative to this matter. I told Mr. Thompson that without the authority of the Bureau in Washington that an investigation could not be conducted. He requested that I request such authority. I did and received authority to conduct such investigation as Mr. Thompson might suggest. I asked him what he wanted done and conducted the investigation.

Q. What did he say he wanted done?

A. He wanted Mr. Smith interviewed, wanted the individual who [109] talked to him identified, he wanted some background on the individual, and he wished me to recontact him to determine what further investigation he thought would be required.

Q. Do you know what specific charge was involved in that investigation?

A. Yes; it was an obstruction of justice. The

(Testimony of T. Hiram Callister.)

Thompson what further investigation he wished to make, whether he wanted me to interview other jurors to see whether any approach had been made and whether he wanted Mr. Satterly located and interviewed. He asked me if I would take the matter up with Judge Foley.

Q. Did you?

A. On January 4, 1952, I contacted him. I didn't contact him before because the case recessed over the holidays and he was not available, and on January 4th I furnished Judge Foley with the results of the investigation and asked what further investigation he desired. I furnished him with the criminal and credit check I had made and he thought no further investigation was required at that time and no further investigation was conducted.

Q. And that concluded the work that you did on the matter? [116]

A. The only thing I did was recontact Mr. Thompson on March 10, 1952, after the trial was concluded, to see if there was any other investigation he desired at that time. He said no.

Q. And that is your entire recollection of what you did pursuant to Mr. Thompson's instructions?

A. That is correct.

Mr. Graves: You may cross-examine.

Cross Examination

Q. (By Mr. Gillen): Mr. Callister, I notice that you refresh your recollection on the details, from

(Testimony of T. Hiram Callister.)

some notes that you produced from your pocket, is that correct? A. That is correct.

Q. And those were notes that you made at or about the time that these various matters were personally gone into by you, is that correct?

A. These were the notes that I made at the time I interviewed Mr. Smith.

Mr. Gillen: I should like to see those notes, your Honor.

Q. These notes are in your handwriting, are they, Mr. Callister? A. Yes, sir.

Q. You said that you had made some inspection of the credit and criminal record?

A. I will have to refer to my notes.

Mr. Gillen: May I see them?

Mr. Graves: Your Honor, we object, because he did not [117] refer to them in his testimony. It is incompetent, irrelevant and immaterial.

The Court: It is merely a report which the witness made concerning the result of his investigation, some record that is concerning the witness Satterly, which he thought to be material.

Mr. Gillen: He testified, your Honor, that he had gone into those matters as part of this investigation and made those matters known to both the Judge and the deputy United States attorney.

The Court: Yes, but he didn't say what they were.

Mr. Gillen: No, he did not.

The Court: What bearing would they have?

Mr. Gillen: I don't know, your Honor. I am in

(Testimony of Martadel Cooper.)

Q. And did you take notes at the request of Judge Exley? A. Yes.

Q. I show you what has been marked Exhibit C and ask you to look at it. Do you know what that it, Miss Cooper? A. Copy of my notes.

Q. And that represents everything that you took down at that interview, is that correct?

A. Yes, sir.

Q. Do you have any independent recollection of that interview at this time? A. No, I don't.

Mr. Graves: You may cross examine.

Mr. Gillen: No questions.

## WALTER CAMPBELL

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Walter M. Campbell.

Q. Where do you live, sir?

A. 252 So. Del Mar, San Gabriel.

Q. What is your profession?

A. I am an attorney-at-law.

Q. And at the present time engaged in private practice? A. I am, sir. [102]

Q. But for some time, particularly during 1951 and 1952, or a portion thereof, were you attorney for the United States of America?

A. I was, sir.

Q. In what capacity, sir?

(Testimony of Walter Campbell.)

A. I was a special attorney for the Bureau of Internal Revenue.

Q. In such capacity were you assigned to the trial of the United States of America vs. Elmer F. Remmer? A. I was, sir.

Q. And did you actively participate in that trial here in Carson City, Nevada?

A. I did, sir.

Q. And throughout the entire trial?

A. Yes, sir, with the exception of one or two days, I was present throughout the trial.

Q. Are you acquainted or do you know, Mr. Irving J. Smith, one of the jurors at that trial?

A. I am not personally acquainted with him. I saw him throughout the trial and said "Good morning" and "Good evening" during the trial, and spoke to him today, as a matter of fact.

Q. Now at any time during that trial did it ever come to your attention that juror, Irving J. Smith had had a conversation with the Honorable Roger T. Foley?

A. It came to my attention, yes, sir.

Q. And how? [103]

A. To my best recollection, the matter was reported to me by Mr. Bruce Thompson, an assistant United States attorney.

Q. Were you ever present at any time at any interview between Judge Foley and Mr. Smith?

A. No, sir.

Q. Were you ever present at any time in Judge Foley's chambers when a conversation was had

(Testimony of Walter Campbell.)

among Judge Foley, Bruce Thompson, possibly Mr. Shelton and yourself?

A. Not to the best of my recollection, sir. I have searched my recollection as to that matter. I have discussed it with Mr. Thompson and Mr. Shelton. I have no recollection of such conversation.

Q. So the only knowledge you have at all is what Mr. Bruce Thompson told you?

A. Yes, sir.

Q. You have no independent recollection of anything else, other than that?

A. I have an independent recollection of what Mr. Thompson told me at that time, but I have no recollection of any conference with Judge Foley.

Mr. Graves: You may cross examine.

Mr. Gillen: No questions.

JAMES H. SHELTON

a witness on behalf of the government, being duly sworn, testified as follows: [104]

Direct Examination

Q. (By Mr. Graves): Will you state your name, please? A. James H. Shelton.

Q. Where do you live, Mr. Shelton?

A. I am now living in Silver Springs, Maryland, a suburb of Washington, D. C.

Q. What is your profession?

A. I am assistant to the head of the Enforcement Division Chief in the Internal Revenue Service.

(Testimony of James H. Shelton.)

Q. How long have you been engaged in that capacity?

A. I have been in that station, or equivalent, since January of 1953.

Q. And prior to that time you were employed by the government also?

A. I was employed prior to that in the San Francisco Regional Office of the Bureau of Internal Revenue, from July of 1950 to January of 1953 as a special attorney.

Q. And in your capacity as a special attorney in the San Francisco office for the Internal Revenue, were you assigned to the trial of the United States of America vs. Elmer F. Reimmer?

A. I was.

Q. And pursuant to that assignment, did you participate in that trial at Carson City, Nevada?

A. I did.

Q. Did it ever come to your attention, at any time during that [105] trial, that there was a conversation took place between Irving J. Smith, one of the jurors and Judge Foley?

A. It did.

Q. How did you ascertain it?

A. To the best of my recollection, the information came to me from Mr. Bruce Thompson, then Assistant United States attorney.

Q. Were you present at a conversation between Judge Foley and Mr. Smith?

A. I have searched my memory and I am reasonably sure that I was not present during any such conversation.

(Testimony of James H. Shelton.)

Q. Were you ever present at a conversation in Judge Foley's chambers, in which were Judge Foley, Bruce Thompson and yourself?

A. Well, there were a number of conferences during the trial, but I was not present, I am sure, at any conference on the matter involved in this hearing.

Q. So that the only information of this situation that you have is what Assistant United States attorney at that time, Bruce Thompson, told you?

A. Well, after the trial was over, there were newspaper accounts and discussions among the attorneys and others involved in the case and afterword was brought of the conversation between Mr. Smith and Judge Foley, the matter was discussed among government counsel and other government representatives, including government agents at the trial. [406]

Mr. Graves: You may cross-examine.

Cross Examination

Q. (By Mr. Gillen): Mr. Shelton, did you personally reveal to the public press, or any member representative of the public press, the incident revealing juror Smith and Judge Foley in their interview?

A. The matter had been revealed to them before I discussed it with them. After the close of the trial, and before all of the government representatives had gone back to San Francisco, the matter was discussed by me with one or more representa-

(Testimony of James H. Shelton.)

tives of the press, but I am reasonably sure that they had obtained earlier information from another source, because it was a matter which I considered it was not my function to reveal to any one outside of the government.

Q. Well, did any press representative tell you where the information was obtained from?

A. Not that I recall, Mr. Gillen. The matter was discussed, to the best of my recollection, the press representatives did not state to me the source of their information.

Mr. Gillen: I think that is all.

Mr. Graves: No further questions.

Mr. Gillen: We would like to recall Mr. Campbell to the stand for one question regarding the source of information.

WALTER M. CAMPBELL

resumed the witness stand on

Cross-Examination

Q. (By Mr. Gillen): Mr. Campbell, I should have asked you, did you personally, [107] or did anyone in your presence, reveal to the press the incident of the report by the juror Smith to Judge Foley of Mr. Satterly's conversation with him?

A. Not to the best of my recollection.

Q. You personally never revealed it to the press?

A. I feel sure not.

Q. The press first discussed it with you was when?

(Testimony of T. Hiram Callister.)

FBI had jurisdiction over the investigation of possibly obstruction of justice, and it was on that basis that the investigation was undertaken.

A. And does a third party or outsider contacting a juror come within that crime?

A. It could.

Q. Would you please state what you did?

A. I went on the morning of December 22nd, at approximately 11:00 a.m. to the office of Mr. Smith, which office is located on Sierra Street in Reno, Nevada, 38 North Sierra Street, Gibbons & Smith, and interviewed him concerning his talk with Mr. Satterly.

Q. Who was present at that time?

A. When I went into the main office, there were other individuals present. I asked for Mr. Smith and was escorted to his private offices within the establishment.

Q. When you reached his private office, who was present? A. Only myself and Mr. Smith.

Q. Please state the conversation. [110]

A. I identified myself to him as a special agent of the Federal Bureau of Investigation and exhibited my credentials to him. I told him I had been requested to conduct an investigation relating to his talk with Mr. Satterly and the possibility of improper approach. I then asked him how long he had known Mr. Satterly and how he had become acquainted with him. He told me that he had sold Mr. *Smith* a house approximately five years prior to the time I contacted him and had known him in a

(Testimony of T. Hiram Callister.)

business way from that time until the time he was interviewed. He stated that they occasionally met while they were both hunting, but he had not specifically gone hunting with Mr. Satterly, but in the course of hunting were together. He mentioned that Mr. Satterly had lived in the outskirts, between Reno and Sparks at the time the contact was made, had since left the area. He told me the individual's name was James A. Satterly and he formerly owned a home at 731 West Pueblo, Reno, and his wife's name was Evelyn Satterly. He pointed out that he had had an insurance policy on the Oldsmobile of Mr. Satterly, that this Oldsmobile was involved in a wreck and as a result of that wreck Mr. Satterly had purchased a 1951 Hudson. He furnished me the motor number of the Hudson and name of the agency which sold the car to him. At that time Mr. Smith was unable to locate the exact place where he thought he could be located and I thought we could locate him through the agency that sold the automobile to him. [111]

Q. From what source did Mr. Smith give you the information, the motor number pertaining to the Hudson motor car?

A. He obtained a file from his office records.

Q. Was that done in your presence?

A. No, he called for the file and handed me the file and it contained the motor number of the Hudson. I have the motor number listed in my notes.

Q. Did you notice what document it was that had this motor number on it?

(Testimony of T. Hiram Callister.)

A. No, I didn't particularly notice.

Q. You may proceed.

A. He furnished some background to me relating to Mr. Satterly. He told me when he first became acquainted with Mr. Satterly, Mr. Satterly was working for Frenchy Perry, who was then operating the Tropics, and he stated during the time he had known Mr. Satterly he understood Mr. Satterly had worked at the Casa Blanca, which is in Redding, California. Through inquiry I heard this was an auto court and restaurant, with possibly a gambling casino in the back room. I asked him for a description of Mr. Satterly and was furnished a description of him and his occupation was furnished a gambler or card dealer, and then concerning the specific contact with Mr. Satterly, I was informed on Tuesday night, December 18, 1951, at about 8:30 p.m. Mr. Satterly and his wife came to Mr. Smith's house at 974 Fifth Street, Sparks, Nevada, and Mr. Smith attempted to quote the [112] conversation as nearly as he could and he told me that Satterly told him, "I must see you about my insurance." Then he pointed out to him he had this new Hudson and gave the background of the whole thing and said he had an inquiry from the Firemen's Insurance Fund and he would have to fill out a blank and he didn't know if he had filled it out right. He wanted to change his insurance from the Oldsmobile to the Hudson, pointed out the insurance was coming due in January, 1952, and he would like to renew the policy at that time and pay

(Testimony of T. Hiram Callister.)

for it in advance. He told Mr. Smith he was going to Portland and then possibly to Coeur d'Alene where he was trying to buy a gambling establishment, and then, according to Mr. Smith, he stated: "Oh, you are on the jury, aren't you?" and Smith said, "Yes, I am busy every day", and then, according to Mr. Smith, Mr. Satterly stated, "I know Bones Remmer very well. He sold Cal-Neva for 850 thousand dollars. He really got about $350,000 under the table, and has about $300,000 he doesn't touch. Why don't you make a deal with Bones?" Mr. Smith stated at that time he stopped him and told him he was a member of the jury and had been instructed by the federal judge who was presiding at the case, not to discuss the case with any one, and no more was said. I asked Mr. Smith then whether he thought that this was an approach to influence his decision as a juryman and he said that he did not consider it such. He felt that Mr. Satterly might have been feeling him out, but did not believe he had been [113] in contact or representing Mr. Remmer. He felt that if his reception had been cordial, that Mr. Satterly might have considered going ahead and contacting Mr. Remmer and might have considered setting up a deal. That was the background information he furnished me. He said that he thought over the approach and at first was not going to report it, because he thought it was a joke, and then decided to report it to the Judge, because the Judge had been so specific in instructing them. He told me his wife was present at the

(Testimony of T. Hiram Callister.)

time the statement was made. He also pointed out that Mr. Satterly had sold his house in Reno, had received about $19,000 for it. After clearing up what he owed, he had about $12,000 left and this was dwindling and he would like to get into some business before the money was gone. He then stated on December 19, 1951, that Mr. Satterly had come to the office and paid cash for the new policy and he gave me the number on the policy as Firemen's Indemnity Fund, L 1253847, so I presume it must have been presented earlier to me, after he took the number from it. That was the extent of my conversation with Mr. Smith, except for some minor information.

Q. At any time during your interview with Mr. Smith, did Mr. Smith say anything to you about the fact he and Mr. Satterly frequently joked with each other?

A. I don't recall that any such statement was made.

Q. Did Mr. Smith tell you that he had gone to see Judge Foley [114] two days after the 18th?

A. He told me shortly after the talk with Mr. Satterly, he had gone to see Judge Foley, and I gathered it must have been right away, because I was asked to conduct the investigation on the 21st and contact was made at 8:30 p.m. the 18th, so it must have been shortly after.

Q. Have you completed now your interview with Mr. Smith? A. Yes.

(Testimony of T. Hiram Callister.)

Q. Did you then make any contact or interview with Mr. Satterly? A. I did not.

Q. Did you try to?

A. I checked the records of the motel where he had been staying and found that he had been in cabin No. 7 from September 20th to December 9th and back in again from December 17th to December 20, 1951, and that he had left the area prior to the time I received the information.

Q. And you did nothing further in that regard, in contacting Mr. Satterly?

A. I did not attempt to contact him at that time.

Q. After you had talked to Mr. Smith about his talk with Mr. Satterly, did you then report back to Bruce Thompson?

A. I checked the information relative to Mr. Satterly and then reported back to Mr. Thompson.

Q. When did you report back to Mr. Thompson?

A. I saw Mr. Thompson the 24th of December, 1951, and reported [115] to him the investigation up to that point.

Q. The report that you made to Mr. Thompson was substantially what you just testified to now?

A. Plus the credit and criminal information which I checked relative to Mr. Satterly.

Q. And that was all the association you had with the matter, is that correct?

A. No, when I talked to Mr. Thompson, I pointed out to him what I had found out and that Mr. Smith felt that the matter was more or less a joke and had not taken it seriously. I did ask Mr.

(Testimony of Mrs. Helen Mack.)

permitted to let Mr. Smith give expression as to whether or not he——

The Court: (Interceding) I admitted that under circumstances which I explained at the time was only a matter of weight. The objection went to the weight of the testimony.

Mr. Gillen: I have this in mind, your Honor, if we were able to show your Honor that there was some indication of prejudice on the part of Mr. Smith during the deliberations or before, then, of course, that might have effect upon Mr. Smith's statement he was not prejudiced.

The Court: He may have been very obstinate as a juror; it wouldn't have any bearing on this issue, so far as I can see. I don't know what effect that would have. A good many circumstances occur in the trial of the case and each one may be considered by the jury and is for them to go into. The courts have expressed themselves on that subject from time to time. That is the reason for the rule you can't inquire. Do you have any other questions?

Q. Mrs. Mack, did Mr. Irving J. Smith ever thank you for participating in finding Mr. Remmer guilty on some of the counts of the indictment and tell you he had been under pressure? [130]

A. He did.

Q. And when and where did he say that?

A. The night he brought me home from Carson City on February 23rd and picked up his car at Mr. Tinkham's house and brought me home to 105

(Testimony of Mrs. Helen Mack.)

Gardner Street. I asked Mr. Smith if I owed him any money and he said no and I thanked him for the ride. He also said to me, "I want to thank you, too, Mrs. Mack, because I have been under a terrific pressure."

Q. You said February 23rd, was it the night that the jury returned the verdict?

A. That is right.

Q. I think the record will show that was February, 22nd, Washington's birthday.

A. Oh was it? I beg your pardon.

Q. It was a Friday night, is that correct?

A. Yes, it was.

Q. Did you ask Mr. Smith what he meant by his remark that he was under pressure?

A. I didn't truly ask Mr. Smith, no. He said, "Some time I will discuss it", or "We will get together and talk", or something of that kind and I thanked him and said good night.

Q. Did you ever see Mr. Smith again when he said he was under pressure? A. I did not.

Q. You had not known about this upset that occurred in December [131] between Mr. Smith and Mr. Satterly and Mr. Smith reporting it to Judge Foley? A. I did not.

Q. After Mr. Smith had made the statement to you and bade you good night, did you enter your home? A. I did.

Q. Who was present in your home at that time?

A. My husband, Mr. Mack, deceased.

Q. And your husband passed away last year?

the dark whether they would be helpful to your Honor as to the entire facts or not. I do not know. It may be that if your Honor would determine they were of material value, the findings of Mr. Callister——

The Court: Well, I don't know what this will disclose. There is nobody on trial here. Unless there is some materiality—I don't know what is in these records—unless it has some material bearing on the issue which the Supreme Court, I must constantly remind you, has submitted to this court, I don't want to see any one's reputation unnecessarily handled [115] around unless there is a good reason for it.

Mr. Gillen: I have no desire to do that.

The Court: I know that. I just want to be sure there might be some materiality. If you want to look at it, satisfy yourself about it, in conjunction with the United States attorney, the Court has no objection.

Mr. Gillen: I happen to be one of the greatest upholders of people's names. Would there be any objection, then, if I examined it before any matters are gone into?

The Court: No, if there is anything, call it to my attention outside of the record.

Q. Mr. Callister, did you ever have a second interview with Mr. Smith? A. No, I did not.

Q. Did you ever bring to the attention of Mr. Smith any matters that were disclosed to you from an investigation of either criminal or credit files?

(Testimony of E. Hiram Callister.)

A. I had no further contact with Mr. Smith for the original interview. I furnished him no information relating to the credit or criminal files or any other information of the further investigation after the interview with him.

Q. You did, however, disclose any matters that you discovered in either of those files to both Mr. Thompson and Judge Foley? A. I did. [119]

Q. Together with all other matters, particularly your interview with Mr. Smith? A. Correct.

Q. Did it ever come to your attention, Mr. Callister, at any time that Mr. Satterly had been contacted out of the State of Nevada?

A. I know that Mr. Satterly was not interviewed in relation to this investigation until 1954.

Q. Now Mr. Smith's office, his private office at the real estate office, where you interviewed him that day, that private office is a location that was partitioned off, where the partitions did not run completely to the ceiling, isn't that correct?

A. Frankly, I can't recall.

Mr. Gillen: As to this matter, I would like your Honor to have an opportunity to examine this additional matter and I would be inclined to leave it entirely to your Honor as to determine whether or not it would be helpful evidence on the question your Honor has to pass upon.

Mr. Graves: We object, your Honor—the mere fact that this witness has notes he did not use——

The Court: Of course, the witness testified he

(Testimony of T. Hiram Callister.)

reported the matter referred to to Judge Foley and Mr. Thompson.

Mr. Graves: That is correct.

The Court: If that matter is material, it would only be [120] material on that basis.

Mr. Graves: We object on the further ground it is incompetent, irrelevant and immaterial, so your Honor will have to examine it to decide. Further, I do not think any foundation has been laid for the question.

The Court: Do you want me to look at it?

Mr. Gillen: As to the first notes Mr. Callister did refer to, we desire to offer them in evidence. As to the exact matter to which he did not refer, we would like your Honor to see it.

The Court: Why do you have to encumber the record with this? The witness has already testified as to what I want to consider. Is there something different in the notes?

Mr. Gillen: I think they are a little clearer than he testified.

Mr. Graves: Your Honor, we object to that. The witness has testified, practically read from the report, and I can see no basis legally for the introduction in evidence. We object on that ground.

The Court: Is this record going to be written up? Have you thought that that?

Mr. Gillen: We do not know. We would like it written up, but we don't know.

The Court: I don't see any basis for offering the notes. [121]

(Testimony of T. Hiram Callister.)

If you have any particular note, point it out and it will be in the record.

Mr. Gillen: I would like to mark these original notes for identification then.

The Court: If you desire, if there is something you have not covered, you can cover it for the record.

Mr. Gillen: Here is the other record, for your Honor's pleasure.

The Court: Let me see it. (Examines document). Well, what specific request are you making of the Court? I will not permit this to be simply filed as a document in this case. You know, as experienced counsel, what the rules of evidence are. If you want to impeach your witness in some manner, if he has given testimony you are not satisfied with, there are, of course, methods of impeaching testimony of witnesses. You can ask him certain questions, with which you are all familiar, but unless you want to do that, I do not see any point in having this in the record.

Mr. Gillen: May we have that marked for identification and consider it tomorrow?

The Court: Put it in a sealed envelope and mark it for identification.

Clerk: Exhibit E for identification. (In sealed envelope.) [122]

DEFENDANT'S EXHIBIT "E"

(Copy—Sealed Envelope)

This exhibit ordered sealed by Judge Louis E. Goodman.

O. F. Pratt, Dep. Clerk

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Mr. Stewart: Our point is the first document the witness testified to is the only testimony that is relevant.

The Court: I am inclined to agree with you. These are merely notes the witness made from some record he examined.

Q. Mr. Callister, in your original notes that you testified as having been made during the course of your investigation as these incidents occurred, and which has been marked Defendant's Exhibit D for identification, is it your recollection that your notes reveal verbatim what Mr. Smith told you that Mr. Satterly is supposed to have said to him and he is supposed to have said to Mr. Satterly?

A. If there are quotation marks, then I attempted to take the words, as I recalled them.

Q. I note under quotation marks, that is, within brackets of quotation marks, you have the following: "Oh, you are on the jury, aren't you?" That was a direct quote as Mr. Smith gave it to you, is that correct?

A. That was supposed to have been statement made by Mr. Satterly, yes.

(Testimony of T. Hiram Callister.)

Q. Then you have: Smith: "Yes, I am busy every day". That was also a direct quote?

A. That was supposed to be a direct quote.

Q. And then you have, He said, "I know Bones Remmer very well. He sold Cal-Neva Club for 850 thousand dollars on top of the [123] table—believe he got $350,000 under the table, has about $300,000 that he daresn't touch", meaning he dare not touch?

A. That is correct.

Q. "Why don't you make a deal with Bones?" That is direct quote Mr. Smith gave you and attributed to Mr. Satterly? A. That is right.

Q. And then you have—"Smith stopped him: 'You know Jim I'm not supposed to talk about that case over there. I'm on the jury.' No more was said." That was also a direct quote from Mr. Smith to you, is that correct?

A. The part in quotation marks was the nearest he could make of direct quote. I asked him to try to give the specific words that were said.

Mr. Gillen: Well, I would like to renew my offer of this in evidence.

The Court: You have the witness's testimony. I don't know what you want the paper for. If it will make you feel any better, you may have it.

Mr. Gillen: It will make us feel much better, your Honor.

The Court: All right, mark it in evidence.

Exhibit D marked in evidence.

DEFENDANT'S EXHIBIT "D"

(Copy)

H. J. Smith, Smith & Gibbon, 138 No. Sierra St. 12/22/51.

Sold him house—has insurance business—Both hunt—have met out hunting—

Was staying Rip Van Winkle Court. Left for Seattle.

James H. Satterly—formerly owned house 731 West Pueblo—Wife Evelyn Satterly—1951 Hudson 4 door sedan Mtr M7A-49241 1951 Calif.—lic—bought as used car—

Wrecked 1949 Olds Deluxe Club sedan. Purchased Hudson from Ellis Brock Motors Inc—1595 Van Ness Ave., S. F. Calif.—

Known him 5 years—

Was working for Frenchy Perry in Tropics when first knew him.

Worked at Casa Blanca—Redding, Calif.—Auto Court—Restaurant.

Understand gambling in back room.

Satterly

5' 5"—Dark complex.

175 lbs.—45 years old.

Dark hair—dk. eyes—

Round faced—wears glasses to read—occup—gambler—card dealer.

Tuesday Night 12/18/51—About 8:30 p.

He and wife to Smith's house, 974 5th St. Sparks.

Said "I must see you about ins.—Have new Hud-

Defendant's Exhibit "D"—(Continued)

son—Know a man hit me in Calif—Have inquiry for Fireman's Fund—very nice to him—Did he fill out right—New Ins. coming up 1-4-52. Would like Policy now and pay for it—am going to Portland and then to Coeur d'Alene, Idaho. Trying to buy a gambling estab there. Wife said wanted him to get motel—out of gambling business. Then he said—

"Oh you're over on the jury aren't you."

12/22/51—THC.

About 7:30 p.m. 12/18/51

Smith "Yes, I'm busy every day"

He said "I know Bones Remmer very well"

He sold Cal-Neva Club for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—"Why don't you make a deal with Bones?—" Smith stopped him—

"You know Jim I'm not supposed to talk about that case over there. I'm on the jury."

No more was said—

Court had cautioned him not to talk about case—but if person persisted to bring it to attention of court—

Felt that Satterly was feeling him out—Don't believe he has been in contact with Remmer, but believe he would have made arrangements if reception had been cordial—

Remmer watched Smith enter Judge's chambers to talk to Judge during recess—Thursday morning—

Defendant's Exhibit "D"—(Continued)

Thought it over—decided to report it

Smith's wife—Dorothea Smith present

Sold place in Reno—got $19,000 for it—owed some on it—mortgages place to pay bills on illness of mother-in-law. Cleared about $12,000—now down to 6 or 7,000 according to statement Mrs. Satterly made—

He came to office and paid cash for policy 12/19/51—Firemen's Fund Indemnity 1253847.

Banking connections unknown.

He and several years ago—when first met Satterly—liked him all right but he did plenty of drinking. Don't like wife—but she had courage—waited 15 years for him—did time in penitentiary in Oregon—

Credit 3/13/47

James H. Satterly

Reno, Nev.—731 W. Pueblo St.

Dealer—Tropical Club—Reno, Nev.

In 40's. Was prev. empl. as a dealer at the Tropics but club recently closed and is unemployed at present—

8/26/47 formerly empl.—Zephyr Cove Resort.

Union Fed. Savings—Loan $1,000.

No dependents.

(Jim Griggs or Greggs)

Discussed with Foley 1-4-52.

Recontacted Thompson 3-10-52.

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Q. By the way, Mr. Callister, did you ask Mr. Smith whether, on the second visit from Mr. Sat-

(Testimony of T. Hiram Callister.)

terly, namely on December 19, 1951, when Mr. Satterly is supposed to have gone to Mr. Smith's [124] office and paid cash for the Firemen's Fund insurance policy, whether or not there was any conversation on that occasion with relation to the Remmer trial?

A. I have some recollection that Mr. Smith did not actually talk to him on that day, but it did appear on the policy he came into the office and made the payment that day. I have a recollection that is the way the thing came up, and we must have had the policy before us, because I have the policy number in my notes.

Q. May I ask, Mr. Callister, was it here at Carson City on January 4, 1952, you visited Judge Foley, or was it in his chambers at Reno?

A. It was in his chambers at Reno, Nevada, in the federal building.

Q. And the purpose of that visit was to carry out the request of Mr. Thompson, that you report to the Judge and see if the Judge desired anything further from you?

A. That is correct.

Q. By the way, did you personally release anything concerning this matter to the daily press?

A. I certainly did not.

Mr. Gillen: No further questions.

The Court: I would like to ask you a question.

Q. (By the Court): Will you tell me precisely what you said to Mr. Smith as to the object of your inquiry of him? [125]

(Testimony of T. Hiram Callister.)

A. I told him that the matter had been referred to me by the United States attorney, in which he told me that Judge Foley would like to have some inquiry made as to this talk with Mr. Satterly, to determine whether an attempt had been made to exert any influence on a juror at a trial before Judge Foley.

Q. Did you say to Mr. Smith, in either words or effect, that you were in any way investigating his conduct?

A. I know there was never any inference of attacking his conduct. The whole idea was to determine whether the person who contacted him was violating some law.

Q. Did you say that to him when you initiated the inquiry to him?

A. Did I say what?

Q. Did you say to him whether or not the inquiry which you were making was for the purpose of investigating the conduct of a man by the name of Satterly?

A. Yes, I explained that was the purpose of the investigation.

Q. Did the Bureau interview any other jurors who were in this case?

A. Not until this second matter came up on appeal, in 1954.

Q. I mean before the verdict of the case?

A. No.

Q. There was no other juror? The only juror that [126] was implicated was Mr. Smith?

(Testimony of T. Hiram Callister.)

A. That is correct.

The Court: I think that is all. Any further questions?

Mr. Graves: No further questions, your Honor.

Mr. Gillen: May I have the Court's indulgence a moment?

The Court: Yes?

Mr. Gillen: I have no further questions, your Honor.

MRS. HELEN MACK

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please?

A. Helen Seeger Mack.

Q. Where do you live, Mrs. Mack?

A. 105 Gardner Street, Reno.

Q. How long have you lived in Reno, Nevada?

A. Half a century.

Q. Mrs. Mack, were you one of the jurors in the case of the United States of America vs. Elmer F. Remmer? A. Yes, I was.

Q. Are you acquainted with Mr. Irving J. Smith, a member of the jury?

A. I am acquainted with Mr. Smith, in respect we rode from Reno, Nevada to Carson City, and from Carson City back to Reno, and I never met Mr. Smith until I, myself, introduced myself to him and asked for a ride. [127]

(Testimony of Mrs. Helen Mack.)

Q. And at any time during the trial, until the verdict of the jury came in, did Mr. Smith ever have any conversation or discussion with you concerning any contact made of him by Mr. Satterly?

A. No.

Mr. Graves: You may cross examine.

Cross Examination

Q. (By Mr. Gillen): Mrs. Mack, during the course of the Remmer trial, which took some three months, from the 28th of November, 1951 to the 22nd of February, 1952, with the exception of the occasions when the court was not in session, you rode daily back and forth between Carson City and Reno in attendance on the trial with Mr. Irving J. Smith and other jurors, is that correct?

A. That is correct.

Q. And an expense-sharing arrangement had been made between you, is that correct?

A. That is right.

Q. And on occasions Mr. Smith's car would be used and on other occasions another juror's car would be used, is that correct? A. Yes.

Q. Who were the other jurors?

A. Mr. Tinkham and Mr. Morris, or Morrison, I have forgotten which.

Q. During the rides back and forth, and particularly after December 18, 1951, was there any occasion that Mr. I. J. Smith [128] expressed himself concerning the defendant, Elmer Remmer, or any aspect of the Remmer case?

(Testimony of Mrs. Helen Mack.)

A. Oh, I can't say he expressed himself, no, I couldn't say that. I can say at one time I did remind him and Mr. Morris that we were jurors and not supposed to discuss the case, but I can't say Mr. Smith openly came out and discussed it.

Q. Was there something said between Mr. Smith and Mr. Morris that caused you to admonish them that the case should not be discussed among yourselves?

A. I just can't remember, because I used to ride in the back seat and I can't remember.

Q. Now directing your attention to the days the jury was deliberating, after the case had been submitted to you, was there an occasion when you demanded that the jury be returned to the court room for the purpose of receiving some admonition from the Judge in connection with the conduct of the foreman of the jury?

Mr. Graves: Your Honor, that is objected to upon several grounds. First, it is improper cross examination. Second——

The Court: I am not going to go into any discussions or disagreements the jury had, what the jury disagree upon when they discuss the case. They are expected to quarrel among themselves. That is the way they get results.

Mr. Gillen: Within certain bounds of propriety.

The Court: I think that is wholly immaterial.

Mr. Gillen: The only reason I asked the question, your Honor, was because the government was

(Testimony of Mrs. Helen Mack.)

A. December 9, 1953.

Q. When you got into your house, did you discuss the remark of Mr. Smith with your husband?

A. I did.

Mr. Graves: Objected to, your Honor, beyond the scope of cross examination; no proper foundation laid.

The Court: He hasn't asked the conversation. If he asks to state the conversation, then I will sustain your objection.

Q. Now directing your attention to the following Sunday, which would have been February 24, 1952, I will ask you whether or not there came to your attention any article appearing in the public press, relating to the incident of Mr. I. J. Smith having had this conversation during the trial with this outside person and having reported the incident to Judge Foley, and there having been an investigation made by the Federal Bureau [132] of Investigation? Did that come to your attention?

A. Yes, it came to my attention through the San Francisco Chronicle and San Francisco Examiner.

Q. And did you conclude at that time that that was the reference that Mr. Smith had in mind when he told you he had been under pressure?

Mr. Graves: Just a moment; we object on the grounds it is incompetent, irrelevant and immaterial, no bearing on this case; is the witness's conclusion.

The Court: I will sustain the objection.

Q. Now, Mrs. Mack, did you ever discuss this

(Testimony of Mrs. Helen Mack.)

matter any further with Mr. Smith at any later time? A. I never have.

Q. Did Mr. Smith ever say to you, "Mrs. Mack, some day I will tell you why I was so interested"?

A. That was the end of the interview, when we said good night, when he brought me home. Yes, he did.

Q. When you arrived in Reno from Carson City, in whose automobile were you riding?

A. Mr. Smith's.

Q. From Carson City to Reno?

A. Oh, no, I beg your pardon. From Carson City to Reno Mr. Smith and I were in Mr. Tinkham's car.

Q. When you arrived at Mr. Tinkham's home in Reno, Nevada, was there anything of an unusual nature occur that came to your [133] attention?

A. The fire department was there. I naturally assumed the garage or shed was on fire, and we got out, finally got in Mr. Smith's car and he took me home to 705 Gardner.

Q. That is, from Mr. Tinkham's house to your own home? A. Yes, to my own home.

Q. Mrs. Mack, when you were home, after you had asked Mr. Smith if you owed him any money on this expense sharing arrangement and he said no and you thanked him for the ride and he thanked you, did he make specific reference to what he was thanking you for?

A. I can't recall his exact words because he did thank me for participating with him, being one

(Testimony of Mrs. Helen Mack.)

of the jurors and working with him on the jury and I guess my part that we played upstairs there.

Mr. Graves: We move to strike the portion that she guessed what he was talking about.

The Court: It may go out.

Q. Did he mention specifically connection to the Remmer jury trial?

A. He definitely said that he wanted to thank me for the part I anticipated in. He had been under terrific pressure. He probably didn't use the word "terrific", but did use the word "pressure." I can't recall, Mr. Gillen, his exact words, but that was more or less what I inferred. [134]

Q. But he did tell you at that time that at some time he would tell you why he was so interested?

A. That is right, he did.

Mr. Gillen: I think that is all.

Redirect Examination

Q. (By Mr. Graves): Mrs. Mack, Mr. Smith was foreman of the jury, wasn't he?

A. Yes, he was.

Q. And as foreman he was thanking you for your part as juror?

Mr. Gillen: Just a moment—that is calling for her conclusion, opinion and conclusion. She expressed herself to the best of her ability as to her recollection what Mr. Smith said.

Mr. Graves: I will withdraw the question and reframe it.

(Testimony of Mrs. Helen Mack.)

Q. Did Mr. Smith say to you, as foreman of the jury, he appreciated your cooperation?

A. He did not.

Mr. Graves: No further questions.

Mr. Gillen: No further questions, thank you.

Q. (By the Court): How long was this jury out?

A. Wednesday, I can't recall the date, about noon, until at least 11:00 o'clock Friday night.

Q. When the jury went out, did you select Mr. Smith as foreman? A. That is right.

Q. So he presided over your deliberations then for [135] about two and a half days?

A. Yes, he did.

The Court: That's all.

Mr. Graves: No further questions.

Mr. Gillen: No further questions.

## MRS. SARAH PARKER

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Sarah Parker.

Q. Where do you live, Mrs. Parker?

A. I live on the Jiggs Ranch, Jiggs, Nevada.

Q. Out from Elko?

A. Yes, thirty-nine miles south of Elko.

Q. Were you one of the jurors in the case of

(Testimony of Mrs. Sarah Parker.)

the United States of America vs. Elmer F. Remmer? A. Yes, sir.

Q. At that time I believe you lived in Lovelock?

A. My home was in Lovelock at that time.

Q. And you served throughout the entire trial, did you not?

A. Yes, sir. I was snowed in here.

Q. You are acquainted with Mr. Irving J. Smith, who later became foreman of that jury?

A. Yes.

Q. At any time throughout that trial, until the time of your [136] verdict, did Mr. Smith ever have any conversation with you, or to your knowledge with any other juror, to the effect Mr. Satterly had contacted him?

A. No, sir. The first time I heard anything about this at all was when the FBI man came out and told me this spring. Oh, I take it back—I heard it over the radio.

Q. That was the spring of this year?

A. Yes, sir, I think it was March.

Q. How long was the jury out on its deliberations, Mrs. Parker?

A. Oh, approximately two days.

Q. Is it not a fact, Mrs. Parker, after the jurors brought in the verdict and you were leaving the courtroom that you fainted? A. Yes, I did.

Mr. Graves: That's all.

Mr. Gillen: No questions, thank you.

LOUIS DELMONICO

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Louis Delmonico.

Q. Where do you live?

A. Wellington, Nevada.

Q. Were you one of the jurors in the case of the United States of America against Elmer F. Remmer? A. Yes, sir. [137]

Q. And you served throughout the entire trial, did you not? A. Yes, sir.

Q. Are you acquainted with Irving J. Smith, who later became foreman of that jury?

A. Yes.

Q. At any time during the course of that trial, to and including the time the jury brought in its verdict, did Mr. Smith ever discuss with you any contact of him by Mr. Satterly?

A. No, sir.

Mr. Graves: Your witness.

Q. (By the Court): You didn't hear about it until afterward?

A. No, not until the FBI came to see me.

The Court: This year?

A. Yes.

Mr. Gillen: No questions.

WILLIAM T. CARTER

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. William T. Carter.

Q. Where do you live, Mr. Carter?

A. Smith Valley.

Q. And you were one of the jurors in the case of the United States of America vs. Elmer F. Remmer? [138] A. I was.

Q. And you served throughout the entire trial, did you not? A. Yes, sir.

Q. Are you acquainted with Mr. Irving J. Smith, who later was chosen foreman of your jury?

A. Yes.

Q. At any time throughout the course of the trial and up to and including the time the jury brought in the verdict, did Mr. Smith ever discuss with you the fact that he had been contacted by Mr. Jim Satterly? A. No.

Mr. Graves: Your witness.

Mr. Gillen: No questions.

Recess taken @ 4:40 p.m.

Tuesday, June 8, 1954, 10:00 a.m.

Defendant present with counsel, Messrs. Gillen, Golden, Avakian and Lohse.

Messrs. Graves, Stewart and Rittenhouse representing the government.

N. K. TINKHAM

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. N. K. Tinkham. [139]

Q. Where do you live, Mr. Tinkham?

A. 214 Hillcrest Drive in Reno.

Q. Were you a juror in the case of the United States of America vs. Elmer F. Renfner?

A. I was.

Q. And you served on that trial?

A. Yes, sir.

Q. Are you acquainted with Mr. Irving J. Smith, who was foreman on that jury? A. I am.

Q. At any time during the course of that trial did Mr. Smith ever tell you of any contact that anybody had made with him, concerning the case?

A. Not until after it was completely over and we were going home that night.

Q. After the verdict?

A. After the verdict was in and we were riding home that night.

Q. On the day the verdict came in, which I believe was Washington's birthday, how did you go from Carson City to Reno?

A. Up Highway 395.

Q. And in whose car?

Mr. Gillen: I didn't get the question and answer.

(Last question and answer read.)

Mr. Gillen: I think counsel was misinformed.

(Testimony of N. K. Tinkham.)

The jury was held over night in Carson City. They were not disbanded [140] until after the verdict. I am sorry, I thought you meant the morning of the verdict.

Q. In whose car? A. In my car.

Q. And who was riding with you in your car?

A. Mr. Smith and Mrs. Mack and myself.

Q. And during the course of that trip, did you go from Carson City, Nevada straight to your home in Reno? A. We did.

Q. Do you recall, during that trip, any conversation between you and Mr. Smith and Mrs. Mack?

A. There was a general conversation, what a relief it was to be through with the thing and what a strain it had been this last day or so. There was three months of it and it was especially a strain on me because I had a one-man business, trying to do things at night and come here in the day time, and outside of that Mr. Smith mentioned that he didn't know whether he had been approached or not and so he reported it to the judge and it was passed over. That is about the text of the thing I couldn't say word for word.

Q. At any time during the conversation on the way to Reno did Mr. Smith say anything about any pressure on him? A. Not a thing.

Q. Do you recall saying it yourself?

A. I would say that would be an expression I would use. [141]

Q. During that trip from Carson City to Reno,

(Testimony of N. K. Tinkham.)

did Mr. Smith tell you at that time about what had happened to him?

A. That is you mean as to Mr. Satterly?

Q. Yes.

A. He didn't use any name, as I can remember, and as I said, it was mentioned in a casual way, he had thought possibly he had been approached and he had brought it to the judge.

Q. He mentioned it on that trip?

A. Yes, that night.

Q. At any time during the trial did he ever state that? A. No.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Mr. Tinkham, on the trip home—I say home, Carson City to Reno—you were driving, were you? A. I was.

Q. And Mr. Smith was sitting along side of you? A. Yes.

Q. And Mrs. Mack was sitting in the rear seat?

A. Yes.

Q. And what else can you remember that Mr. Smith talked about, the fact that he thought he had been approached or that he did not know whether he had been approached or not? Did he go into any details?

A. Not that I can recall, Mr. Gillen, at all. [142]

Q. Mr. Tinkham, didn't that arouse your curiosity? Didn't you ask him in what manner were you

(Testimony of N. K. Tinkham.)

approached, or by whom or how, or any one of the natural questions you might be expected to ask?

A. That could possibly be, but I don't remember only as a general thing and he passed it off more or less—it could be a joke or passing remark.

Q. Did he say it was a joke?

A. I couldn't tell you absolutely word for word, but it was my impression. That is the only thing I can say at this time, because that was three years ago and I was pretty well upset getting home.

Q. Mr. Tinkham, did Mr. Smith tell you that he had been approached by a man who was a client of his and the man told him that the defendant, Remmer, had sold Cal-Neva Lodge for 850 thousand dollars over the table and 350 thousand dollars under the table and that he had 300 thousand dollars that he daresn't touch? Did he say anything like that to you?

A. Oh, no. My impression is now just a general remark, nothing like that. I can't remember any mention of figures or anything like that at all.

Q. Now, Mr. Tinkham, is it your present recollection that the only thing that was said in that regard was that Mr. Smith mentioned that he did not know whether he had been approached or not, but that he had reported the matter to the judge?

A. That is my impression, Mr. Gillen.

Q. You have no recollection of exhibiting your curiosity about that and saying, "Well, were you approached?" or "What was the incident?" or "What happened?"

(Testimony of N. K. Tinkham.)

A. Well, I would say we must have discussed it for three or four minutes in a casual way, but the impression was, the whole thing was a casual matter, conversation going from one topic to another and going back and forth about the case.

Q. Now that particular disclosure on the part of Mr. Smith to you came while you and Mr. Smith were discussing what an ordeal it had been to sit through the Remmer trial, is that correct?

A. Well, I wouldn't be able to analyze it down that close. I can't say it was just part of the conversation on our way home. Whether we said it was an ordeal or pressure at that time—I expect I used the term I was under pressure many times going home, because it was such a relief to be away from it now.

Q. There had been some discussion at that time you were agreed among yourselves it was a relief to be through with the task? A. Most definitely.

Q. Did Mrs. Mack participate in that conversation? A. Certainly.

Q. To your recollection did Mrs. Mack ask Mr. Smith in what manner he thought he might have been approached? A. No, I can't state.

Q. What was the incident that gave rise to his making report to [144] Judge Foley, did Mrs. Mack ask that in your presence?

A. I don't think she asked particularly, because in normal conversation like that I would think Mr. Smith would say, "Well, I was approached or thought I was and I reported to Judge Foley." I

(Testimony of N. K. Tinkham:)

don't know, I am just conjecturing now, because I can't give you the absolute conversation.

Q. When was the first time, Mr. Tinkham, that any representative of the United States government discussed with you anything pertaining to this matter that is under inquiry now?

A. Well, it is about a month ago.

Q. Was that Mr. McGee of the Federal Bureau of Investigation?

A. I believe that was the name.

Q. And did you make a statement for Mr. McGee? A. Yes, I did.

Q. And did you sign that statement?

A. Yes, I did.

Mr. Gillen: I would like to ask government counsel, through your Honor, to produce the statement Mr. Tinkham signed for Mr. McGee of the Federal Bureau of Investigation.

Mr. Graves: To which the government objects on the ground and for the reasons it is incompetent, irrelevant and immaterial, not proper evidence. It is the working papers of the government as to what investigation is made. I think the government has the right to protect itself. This statement was taken in 1954. [145]

Mr. Gillen: He said about a month ago. I think we discussed this very matter yesterday and your Honor's ruling was if there was a signed statement in existence, we were entitled to see it.

The Court: Well, I am inclined to think so. I do not think it has any particular materiality to

(Testimony of N. K. Tinkham.)

it, but the inquiry should have wide latitude. If the government is in possession of statement which the witness signed, I think it should be produced.

Mr. Graves: May we have your indulgence for a moment, your Honor?

Mr. Gillen: I exhibit the statement which was handed to me by government counsel to the witness. After looking at this statement, tell me whether or not that is your signature? A. Yes, sir.

Q. And to the best of your knowledge is that the statement you made to Mr. McGee of the Federal Bureau of Investigation approximately a month ago? A. That is right.

Mr. Gillen. The signed statement is not inconsistent with the witness's testimony and there is no reason to introduce this exhibit.

The Court: I think it had better be marked for identification then; otherwise, there is nothing in the record to show what it was. [145]

Mr. Gillen: Very well, I have no objection.

The Court: You may mark it Court's Exhibit No. 1 for identification.

## COURT'S EXHIBIT No. 1

(Copy) Reno, Nevada, March 19, 1953

I, N. A. Tinkham, make the following voluntary statement to Special Agent L. J. McGee, FBI. No threats or promises were made to get me to make this statement.

During the trial of the United States vs. Elmer

Court's Exhibit No. 1—(Continued)

Remmer, I was a member of the jury. For at least the last month of the trial Mr. I. J. Smith and I and others rode together from Reno to Carson City, Nevada and return.

At no time during the trial, or during any of the above trips, or at any time prior to the return of the verdict did I learn from Mr. Smith or from anyone, that a person had contacted Mr. Smith. It was not until we were returning to Reno after the verdict had been returned that Mr. Smith mentioned he had been contacted by a person during the trial.

I have read the above statement and deem it true to the best of my recollection.

/s/ N. A. Tinkham

Witness: L. J. McGee, Special Agent, FBI, Reno, Nevada.

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Q. Mr. Tinkham, upon arriving at Reno on the night of February 22, 1952, did you discover something of an unusual nature at or about your premises? A. Yes, certainly.

Q. What was the thing you discovered?

A. Fire engines.

Q. Was some structure on your property on fire? A. That is right.

Q. What was that structure?

A. It was a shed in back of the house.

Q. Mr. Smith's automobile was at your premises, is that correct? A. Yes.

(Testimony of N. K. Tinkham.)

Q. And there had been an arrangement between you and Mr. Smith and Mrs. Mack for a share of expenses riding back and forth, is that correct?

A. That is right.

Q. Part of the time you used your automobile and part of the time Mr. Smith used his?

A. That is right.

Q. And it so happened your automobile was in use for the purpose of riding back and forth on that occasion? A. That is correct. [147]

Q. And Mr. Smith left his automobile at your house? A. Yes.

Q. And arriving at your house, after the excitement of the fire subsided, Mr. Smith and Mrs. Mack left in Mr. Smith's automobile, is that right?

A. That is right.

Mr. Gillen: I think that is all.

Mr. Graves: No questions.

## A. W. RINGLEE

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. A. W. Ringlee.

Q. Where do you live, Mr. Ringlee?

A. 528 Gordon Avenue, Reno.

Q. Did you serve as a juror in the case of the United States of America vs. Elmer F. Roemmer?

A. Yes.

(Testimony of A. W. Ringlee.)

Q. And during the course of that trial did you become acquainted with Mr. Irving J. Smith, who later became foreman of the jury? A. Yes.

Q. At any time during the course of the trial, to and including the time the verdict was returned, did Mr. Smith ever discuss with you the fact that Mr. Satterly had approached him in connection with this case? [148] A. No.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Graves): Did Mr. Smith, Mr. Ringlee, at any other time tell you that he had been approached by anybody during the trial?

A. No, he did not.

Q. Or that he reported any incident to Judge Foley? A. No, sir.

Q. Have you seen Mr. Smith to talk to after the trial? A. Saw him about a week ago.

Q. Is that the first time since the trial that you saw Mr. Smith to talk to?

A. I am not sure, but I think so.

Q. Mr. Ringlee, on that occasion, about a week ago, was there anything said by Mr. Smith about his having been approached by some one during the course of the trial and having reported the incident to Judge Foley?

A. I don't think so, no, sir.

Q. When was it that this matter first came to your attention, this incident?

A. You mean——

(Testimony of A. W. Ringlee.)

Q. That there had been such an incident occur to Mr. Smith?

A. I read it in the paper about three days after the trial.

The Court: You mean three days after the verdict?

A. Yes, after we went home. [149]

Mr. Gillen: I think that is all, thank you, Mr. Ringlee.

Mr. Graves: That is all.

## LAWRENCE A. HILL

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Lawrence A. Hill.

Q. Where do you live, Mr. Hill?

A. 3790 Warren Way, Reno.

Q. Did you serve on the jury at the trial of the United States of America vs. Elmer F. Remmer?

A. Yes, I did.

Q. During the course of that trial did you become acquainted with Irving J. Smith, who later became foreman of the jury? A. Yes, sir.

Q. At any time during the course of that trial, to and including the time the verdict was returned, did Mr. Smith ever converse with you concerning contact made with him by Mr. J. A. Satterly?

A. No.

(Testimony of Lawrence A. Hill.)

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Did he at any time after the trial tell you of this incident?

A. No, he did not.

Q. Did you talk to him after the trial? [150]

A. Oh, I have seen him occasionally, three or four times.

Q. When did you first learn about the matter?

A. In the newspaper.

Q. Within a day or two after the verdict had been returned?

A. Well, shortly after the conclusion of the trial, yes sir.

Mr. Gillen: I think that is all.

Mr. Graves: No further questions.

RICHARD J. CURNOW

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Richard J. Curnow.

Q. Where do you live, Mr. Curnow?

A. Reno.

Q. Did you serve on the jury in the case of the United States of America vs. Elmer F. Remmer?

A. I did.

Q. Did you serve throughout the whole trial?

(Testimony of Richard J. Curnow.)

A. I did.

Q. During the course of that trial did you become acquainted with Mr. Irving J. Smith, who later became foreman of the jury?

A. I did.

Q. At any time during the course of that trial did Mr. Smith ever talk to you concerning alleged contact of him by Mr. James A. Satterly? [151]

A. He did not.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Mr. Curnow, you were one of the active jurors in the Remmer trial, were you not, that is, one of the twelve who passed upon the verdict? A. Yes.

Q. And there were, throughout the trial, two alternate jurors, is that correct? A. Yes.

Q. Now, Mr. Curnow, directing your attention to a time about the middle of the trial, or during perhaps the month of January of 1952, did you have the experience of being approached on the steps of this postoffice building in Carson City by a deputy United States marshal and questioned concerning whether or not you had been accosted or approached by any one concerning the Remmer trial?

Mr. Graves: If your Honor please, we object upon the grounds and for the reason it is not proper cross examination, not within the issues of this hearing.

(Testimony of Richard J. Curnow.)

The Court: This is not a matter that is within the issued and that have been submitted to the court when the case was remanded.

Mr. Gillen: I would be very happy to make an offer of proof. [152]

The Court: How was it related? It wasn't raised on motion for new trial?

Mr. Gillen: Yes.

The Court: It wasn't covered by the affidavits that supported the motion for a new trial when the Supreme Court remanded the case?

Mr. Gillen: No, it was not raised in the motion for new trial because it was not within our knowledge at that time.

The Court: I don't consider it proper to raise it now.

This is not a motion for a new trial.

Mr. Gillen: Here was our position at that time, may it please the Court—on the occasion of motion for new trial the matter pertaining to Mr. Smith was within our knowledge, had been brought to our attention through the public press or through interview by reporters the day following the close of the trial. In our motion for a new trial, we ask that we be afforded opportunity to have an open hearing to determine whether any other jurors, other than Mr. Smith, had been approached by any outside or extraneous contact. Of course, that was denied us. Now at a later time certain matters were gleaned from Mr. Curnow and a form of affidavit was prepared for Mr. Curnow to sign and form of af-

(Testimony of Richard J. Cermow.)

fidavit was prepared and actually executed by Mrs. Mack, and we feel in this hearing, may it please the Court, we have the right to present to your Honor, as the trier of these facts, this particular incident. I should like to present [153] to your Honor what in effect is in the form of offer of proof. It does tie up—government counsel should know this—it does tie up with the Smith incident and I noticed in the question by your Honor yesterday, your Honor made some inquiry as to whether or not anything that happened to Mr. Smith was brought to the attention of any other jurors. Your Honor corrected me in my questions of Mr. Smith, whether or not any proof had been *proof had been* established that other jurors became acquainted with it during the trial, and I recall your Honor asked the specific question as to whether or not this matter was brought to the attention of any other jurors during the trial.

The Court: That question was asked of the juror here and he said no. Of course, you have a right to cross examine him, but it wouldn't go to the question of whether or not this matter came to his attention through some inquiry as to whether or not the deputy marshal asked the witness if he had been approached. Even if it had been true, I do not see how it could have any bearing. This is not a motion for a new trial. Maybe under the statute, under the rule rather, you might at any time make a motion for a new trial, I don't know. You would

(Testimony of Richard J. Curnow.)

have to make a pretty strong showing in that regard.

Mr. Gillen: May I make this observation, your Honor, [154] that the government counsel asked this witness whether or not Mr. Smith had mentioned this incident to him and he said no. He was not asked whether anybody else mentioned the Smith incident to him, and that is what I expect to develop.

The Court: You may ask him that. I understood this had nothing to do with this matter.

Mr. Gillen: With the Smith matter?

The Court: With the Smith-Satterly matter. I understood you to say that.

Mr. Gillen: Yes, to this extent, your Honor—well, shall I proceed?

The Court: Well, ask the specific question, just ask the specific question.

Q. Mr. Curnow, is it not a fact that during a time, that is fixed in your mind as approximately the early part of the month of January, 1952, you were leaving this building, in company with some other jurors, and that you were approached on the steps of the building by a deputy United States marshal, and that the deputy United States marshal asked you whether or not you had been approached or accosted by any outside person, pertaining to the trial, and that you answered the deputy United States marshal, no, you had not and why did he ask, and the United States deputy marshal said to you, "Because one of the other jurors had been

(Testimony of Richard J. Curnow.)

approached" or "offered a bribe", or something to that effect, and you asked him who that was and he [155] said he wasn't at liberty to tell you?

Mr. Graves: To which the government objects, as not being within the issues of this hearing. The specific issue in this hearing is to find out whether or not Mr. Irving J. Smith had discussed this with any other jurors. He is trying to introduce an element which he should have introduced at the time of motion for new trial. We object upon the grounds it is incompetent, irrelevant and immaterial to the issues of this hearing.

Mr. Gillen: I do not think, your Honor, we are limited to what Mr. Smith may have said to any fellow jurors or any fellow jurors may have heard from Mr. Smith personally, and may I invite your Honor's attention to the record of the Supreme Court of the United States. It says, 451 Supreme Court Reporter:

"The above-stated facts were alleged in a motion for a new trial, together with an allegation that the petitioner was substantially prejudiced, thereby depriving him of a fair trial, and a request for a hearing to determine the circumstances surrounding the incident and its effect on the jury."

Now here, may it please the Court, we have——

The Court: (Interceding) Gentlemen, I do not think it is necessary to argue it now. I see no reason why the answer may not go into the record. I think an inquiry of this man, to use the language of the [156] street, is a little bit silly to rule on the

(Testimony of Richard J. Curnow.)

form of the question. Might as well have the answer in, so you may answer the question.

A. The answer is it is not what happened.

Q. Will you relate to the Court what did happen?

A. As I was leaving the building, to the best of my recollection, one of the guards at the door, I presume the marshal, asked if I heard any discussion by any of the jury panel about any one being approached, or if there was any discussion of the trial by the jury panel, and I told him no and asked him why and he said, well, he was just curious, and I presumed he was merely checking, to do his particular job or his duty.

Mr. Gillen: I move that portion be stricken, what Mr. Curnow presumed.

The Court: It may be stricken.

Q. Is that the entire incident, as you recall it?

A. That is, to the best of my knowledge.

Q. Now, Mr. Curnow, do you remember July of 1953 that Mr. George Lohse, the local attorney, and I contacted you at your home on the telephone?

A. I remember you contacted me, yes, but the dates I do not remember.

Q. Do you recall that I requested the opportunity to come out and see you and discuss this particular incident of your being approached on the front steps of the courthouse, in the postoffice [137] building here in Carson City, and you stated to me you had just started on your vacation and you had

(Testimony of Richard J. Curnow.)

a number of things you were trying to do around your house and you couldn't take the time?

A. That may be true.

Q. Do you recall that I discussed with you on the telephone what had occurred and I told you I was going to dictate from the information you gave me an affidavit to be submitted to you for your signature, do you recall that? A. Correct.

Q. Do you recall later that day I telephoned you again and I told you I had the affidavit ready and I asked if I might come to your home and have you read it and sign it, do you recall that?

A. Yes.

Q. Do you recall you told me you were busy and it would be very inconvenient for you and if I would send the affidavit to your house by Mr. Lohse, who lived in your general neighborhood and passed your house, that you would read it and if you found it correct, you would sign it. Do you recall that?

A. Correct.

Q. Do you recall that I asked you, "May I read the affidavit to you on the telephone so that I could make corrections with Mr. Lohse's secretary in his office if there was any error", do you recall that?

A. I believe so.

Q. And do you recall that I did read you the affidavit over the telephone?

A. It could have been possible, but I do not positively recall at this time.

Q. Do you recall that Mr. Lohse did later that

(Testimony of Richard J. Curnow.)

evening bring you the original and a copy of the proposed affidavit?

A. I don't know whether it was that evening, but I did receive a copy.

Q. And do you recall that you determined you would not sign the affidavit, do you recall that?

A. Correct.

Q. And you gave as your reason you did not see any reason why you should sign the affidavit, do you recall that? A. That is correct.

Q. Do you recall, Mr. Curnow, that on December 16, 1953, some six months after I had been in contact with you, that Mr. Spurgeon Avakian, the tax lawyer, who is present in court, reached you on the telephone and later visited you at your home?

A. He visited me, that is correct.

Q. And that he had an interview with you regarding this incident? A. Yes.

Q. Now do you recall, Mr. Curnow, that you related, both to Mr. Avakian and myself, that when this deputy United States marshal [159] talked to you that it was within earshot of other jurors, but that you couldn't remember the identity of the particular jurors who were present or you didn't know whether they actually heard or not. Do you recall that?

A. I recall that it could have been within earshot of other jurors, that is true.

Q. And that you couldn't remember which jurors they were? A. No.

(Testimony of Richard J. Curnow.)

Q. And there were about three or four jurors, as you recalled, or two or three?

A. As we were leaving the building there would be a number. They always go out at one time.

Q. Now, Mr. Curnow, do you remember who the marshal was?

A. I don't remember positively. I know one of the marshals for a long period of time and I presume it was him, but I don't know which one it was.

Q. Do you recall stating that the marshal was the same marshal, or deputy marshal, who had taken the jury to their meals during the course of their deliberations?

A. That is the marshal I know and I presume that is the one I talked to.

Q. Now, Mr. Curnow, I would like to show you what appears to be a photostatic copy of the proposed affidavit, on legal stationery of the firm of Lohse & Fry, Attorneys and Counsellors at Law, Reno, Nevada. May the record show I am handing it to [160] counsel for his inspection.

The Court: This isn't a paper that he signed?

Mr. Gillen: He never did sign a paper.

The Court: What is the use of taking time on some paper that was prepared that he didn't sign. If it was introduced into evidence, it wouldn't mean anything to me.

Mr. Gillen: I have this in mind, your Honor. We have established that Mr. Curnow had this information read to him on the telephone and did not correct or deny the statement.

(Testimony of Richard J. Curnow.)

The Court: That wouldn't mean anything to me. When I was practicing law, which I practiced for 30 years, I asked a lot of witnesses to sign statements for me of what I thought the facts were, but they wouldn't agree with me. I am not interested in papers attorneys present. He is here on the witness stand and you can conduct any cross-examination, but I do not want to waste time hearing about some papers a lawyer prepared and the witness did not sign.

Mr. Gillen: He already said it was read to him and he didn't deny it.

The Court: He didn't say that. He said he didn't recall that. I want to make it clear I am not foreclosing any cross examination. As I say, a wide latitude should be allowed, but I just do not see any import [161] to a paper the witness did not sign that lawyer prepared.

I am only interested in what the facts are.

Mr. Gillen: We are trying to refresh his recollection on matters related both to Mr. Avakian and myself, particularly words that were attributed to the deputy United States marshal at the time, and he has stated——

The Court: (Interceding) You can ask him the question whether that is a fact or not. If something else different was said than what you stated has been said, I won't attempt to foreclose that type of examination.

Q. Mr. Curnow, let me ask you whether or not, in the month of July, 1953, you stated to me the

(Testimony of Richard J. Curnow.)

following: "During the course of the trial, on a date I can not now recall, I was leaving the post-office building in Carson City, Nevada with some other members of the jury, either at a noon recess or at the end of the court day and I was just about to descend the stairs when a deputy United States marshal accosted me and asked me whether or not anybody had approached me about the case or attempted to discuss the case with me, or words to that effect. I told him no such thing had happened to me, and as well as I can now recall, I asked the reason for his question. He stated some one had approached one of the jurors. I asked him who had been approached and he said he was not at liberty to reveal this information." [162].

Mr. Graves: Your Honor, we object to that question because it is based upon a document prepared by counsel for the defense and not signed by this witness. If he is asking it as a hypothetical question——

The Court: (Interceding) I think it is a valid objection. He has already been asked that question and already answered. You asked him and he said it wasn't that way. Now you are repeating the same thing, except you are reading it now from the paper. I think you asked him a question that contained all that information and he said "No, Mr. Gillen, that is not the way it happened" and then he proceeded to tell you the situation. There is no use wasting time going into it again.

Q. Let me ask you this then—on December 16;

(Testimony of Richard J. Curnow.)

1953, at your home in Reno, did you tell Mr. Sturgeon Avakian the following, about half way through the trial the assistant marshal asked you if anybody had tried to approach you about the case, that you had replied in the negative, and the assistant marshal had then said that some had tried to bribe one of the jurors. Did you so state to Mr. Avakian?

Mr. Graves: Your Honor, that is objected to upon the grounds and for the reason that the subject matter involved has already been asked and answered by the witness.

The Court: He is now asking whether or not he made that [163] statement to Mr. Avakian, which is a little bit different. You may answer.

A. At this time I do not recall the exact wording. When he came to the house, he would take my words and put it down in writing and the terminology would be different from what I would use.

Q. Mr. Curnow, I never came to your house until Sunday evening, is that correct, last Sunday evening, and any previous contact with you regarding this incident was by telephone July of 1953, is that correct?

A. That is correct. You were there two or three nights ago, the first time you came to the house.

Q. And on that occasion I didn't write anything down at all? A. Not to my knowledge, no.

Q. Not in your presence?

A. No, not in my presence.

Mr. Gillen: I think that is all.

(Testimony of Richard J. Curnow.)

Redirect Examination

Q. (By Mr. Graves): Mr. Curnow, as a matter of fact, when Mr. Avakian came to your home, the interview that he had with you was one in which he suggested all these things to you, wasn't it?

A. I don't understand your question.

Q. I say, when Mr. Avakian came to your home, in connection with this proposed statement, which you did not sign, the way he handled that interview was that he suggested these things to [164] you, isn't that so?

Mr. Gillen: We object, your Honor; counsel is calling for self-serving statement.

The Court: I will sustain the objection. I think we have spent enough time on this matter. I think it has no real bearing on the matter. I will sustain the objection. Is there any other question?

Mr. Graves: No further questions.

Recross-Examination

Q. (By Mr. Gillen): Mr. Curnow, you were interviewed by Mr. McGee of the Federal Bureau of Investigation? A. I was.

Q. That was about how long ago?

A. A month or six weeks ago.

Q. And did you sign a statement for Mr. McGee? A. Yes, sir.

Mr. Gillen: I would like to ask government counsel, through the Court, for that statement.

The Court: All right.

Mr. Graves: The government objects, your Honor.

(Testimony of Richard J. Curnow.)

upon the grounds and for the reason it is incompetent, irrelevant and immaterial; is a part of the government's working papers, part of the technique of the FBI.'

The Court: We have gotten so deep in this matter, Mr. Graves, you might as well show him that statement. [165]

Mr. Graves: Very well, your Honor. May I have your indulgence for a moment.

Mr. Gillen: With the Court's permission, I will show the witness this statement.

Q. Mr. Curnow, I show you what purports to be a typewritten statement signed with your signature, is that your signature? A. Yes, sir.

Q. You did not object to signing this statement for Mr. McGee of the Federal Bureau of Investigation? A. No, sir.

Q. Mr. Curnow, does it refresh your recollection that the name of the deputy United States marshal who discussed this matter we have talked about here with you was deputy United States marshal, Hugh Boyd?

A. I presume that this is the name of the man I talked to, because I have known him for a number of years and I did not know the other marshal. I knew him.

Q. You know him for a number of years, but you were not sure of his name, is that correct?

A. I can't say that, no.

Q. Well, you told Mr. McGee of the Federal Bureau of Investigation on March 23, 1954: "I

(Testimony of Richard J. Curnow.)

recall that during the trial I was asked by deputy United States marshal, Hugh Boyd, whether I had heard of any one being contacted, that is, any one on the jury. Mr. Boyd also asked me whether any one on the jury had discussed [166] anything, indicating some one on the jury had been contacted. I answered Mr. Boyd in the negative, since no such matter had come to my attention." Did you recall the name of Mr. Boyd and tell it to Mr. McGee, or did he suggest it to you?

A. I volunteered the name.

Q. So you did remember the name and you did know Mr. Boyd for a number of years; is that correct?

A. I don't know how long, but a number of years.

Q. Was it stated to you that the reason Mr. Boyd asked you, as a member of the jury, about this was because you and he knew each other?

A. No.

Q. Now, Mr. Curnow, you did say to Mr. McGee, the Federal Bureau of Investigation agent, that you had noted that Mrs. Mack, one of the two women jurors, had gone into the judge's chambers and you thought at the time Mr. Boyd's remark might therefore concern her; however, you later heard that she had been mentioning an illness problem to the judge, is that so? A. Yes.

Q. So, in other words, when Mr. Boyd talked to you about some juror here being contacted, you recalled you had seen Mrs. Mack going into the

(Testimony of Richard J. Curnow.)

judge's chambers and you thought she was the juror who was approached, is that correct? A. Yes.

Q. And you later learned she had seen Judge Foley about an altogether [167] different matter, something about an illness matter? A. Yes.

Q. And the next thing that brought to your attention about anybody being approached was reading the article in the newspaper, after the close of the Remmer trial, is that correct? A. Yes.

Mr. Gillen: I will offer, may it please the Court, the statement of Mr. Curnow to Mr. McGee as defendant's exhibit next in order.

Mr. Graves: No objection.

The Court: It may be admitted, Exhibit F. Anything further of the witness?

DEFENDANT'S EXHIBIT "F"

(Copy) Reno, Nevada, March 23, 1954

I, Richard Curnow, make the following voluntary statement to Special Agent L. J. McGee, FBI. No threats or promises were made to get me to make this statement.

I was a juror in the case of the United States vs. Elmer Remmer. I did not at any time receive any information from Mr. I. J. Smith during the course of the trial that he had been approached by a person concerning a matter possibly connected with the trial. I do recall that during the trial, I was asked by Deputy United States Marshal Hugh Boyd whether I had heard of anyone being con-

Defendant's Exhibit "F"—(Continued)

faced, that is, anyone on the jury. Mr. Boyd also asked me whether anyone on the jury had discussed anything indicating that someone on the jury had been contacted. I answered Mr. Boyd in the negative since no such matter had come to my attention.

I wish to state that the fact that Mr. Boyd asked me these questions had absolutely no influence on my decision in the case, and in no way caused me to be prejudiced either for or against the defendant. As a matter of fact, I had noted that Mrs. Mack had gone into the Judge's chambers, and I thought at the time that Boyd's remark might therefore concern her; however I later learned that she had been mentioning an illness problem to the judge.

I wish to state further that I did not know of the incident concerning Mr. Smith being alleged y approached until I saw it in the newspaper after the trial was over.

This is true to the best of my knowledge.

/s/ Richard J. Curnow

Witness: L. J. McGee, Special Agent FBI, Reno, Nev.

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Mr. Gillen: No further questions.

Redirect Examination

Q. (By Mr. Graves): As a matter of fact, Mr. Curnow, in this statement, which is in evidence here, did you not make this statement to Mr. McGee of the FBI——

(Testimony of Richard J. Curnow.)

Mr. Gillen: The whole statement is in evidence.

Mr. Graves: May I finish my question?

Q. ——"I wish to state that the fact that Mr. Boyd asked me these questions had absolutely no influence on my decision in the case, and in no way caused me to be prejudiced either for or against the defendant."

Mr. Gillen: We object to the asking of that question.

The Court: Well, you offered it in evidence, so the [168] whole paper is there for what it is worth.

Mr. Graves: That is right.

The Court: Anything else?

Mr. Graves: We have no further questions.

Mr. Gillen: No further questions.

DONALD A. ANDERSEN

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Donald A. Andersen.

Q. Where do you live, Mr. Andersen?

A. Carson City.

Q. Were you one of the jurors at the trial of the United States of America vs. Elmer F. Remmer? A. Yes.

Q. During the course of that trial did you become acquainted with Mr. Irving J. Smith, who later became foreman of the jury? A. I did.

(Testimony of Donald A. Andersen.)

Q. Did he at any time, during the course of that trial, up to and including the time the verdict was returned, ever discuss with you the fact that he had been approached by a man named James A. Satterly? A. No, he did not.

Mr. Graves: Your witness. [169]

Cross Examination

Q. (By Mr. Gillen): Did you notice Mr. Smith going into the judge's chambers on a day in December, just before Christmas?

A. I do not think so.

Q. Or coming out of the judge's chambers?

A. No.

Mr. Gillen: I believe that is all.

DARWIN K. ELLIS

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Darwin K. Ellis.

Q. Where do you live, Mr. Ellis?

A. Minden, Nevada.

Q. Were you one of the jurors in the trial of the United States of America vs. Elmer F. Remmer? A. Yes, sir.

Q. And during the course of that trial did you become with Mr. Irving J. Smith, who later became foreman of the jury? A. I did, yes, sir.

(Testimony of Darwin K. Ellis.)

Q. At any time during the trial, up to and including the time the verdict was returned, did he ever have any discussion with you, or anybody else, to your knowledge, concerning the fact that he had been approached by Mr. James A. Satterly?

A. No, sir. [170]

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Mr. Ellis, during the course of the trial, and particularly shortly before Christmas, December of 1954, did you observe Mr. Smith going into Judge Foley's chambers or coming out of Judge Foley's chambers on any occasion?

A. No, sir, I did not.

Q. Now were you present on the front steps of this post office building in Carson City, or at any other place, when Mr. Curnow was accosted by a deputy United States marshal?

A. No, sir, I have no recollection of any such incident.

Mr. Gillen: I think that is all, thank you.

STANLEY SMITH

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Stanley J. Smith.

Q. Where do you live, Mr. Smith?

(Testimony of Stanley Smith.)

A. 1115 Nixon Avenue, Reno.

Q. Are you any relation to Irving J. Smith?

A. No.

Q. Did you serve as juror in the trial of United States of America vs. Elmer F. Rohamer?

A. I did.

Q. During the course of that trial did you become with Mr. [171] Irving J. Smith, who later became foreman of the jury? A. Yes.

Q. At any time during the course of that trial, up to the time the verdict was returned, did Mr. Irving J. Smith ever converse with you concerning the fact that a Mr. James A. Satterly had talked with him during the trial? A. No, sir.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Mr. Smith, did you at any time, particularly having reference to a few days before Christmas of 1951, December of 1951, see Mr. Smith, Irving J. Smith walk into Judge Foley's chambers or come out of Judge Foley's chambers?

A. No, sir.

Q. Mr. Smith, did you at any time, here at Carson City, either on the front steps of this building or anywhere in or about this building, see Mr. Curnow being interviewed or talked to by a deputy United States marshal? A. I may have.

Q. You may have? A. Yes.

Q. Do you have any recollection of overhearing a deputy United States marshal by the name of

(Testimony of Stanley Smith.)

Boyd asking Mr. Curnow, within your hearing, whether or not anybody had approached him or he had heard of anybody approaching anybody on the jury about the [172] case? A. No, sir.

Q. By the way, Mr. Smith, you at one time were in the sporting goods business in Reno, were you not? A. Yes, sir.

Q. That is, you conducted a store in which guns and sporting equipment was sold? A. Yes.

Q. And being in that line of business, you were acquainted with various hunting seasons in the State of Nevada, is that correct?

A. That is right.

Q. And during the month of December, is that a regular hunting season?

Mr. Graves: Objected to, your Honor, on the grounds it is incompetent, irrelevant and immaterial, not proper cross examination. If it is preliminary, I can't see the reason.

The Court: It is interesting, but I do not know what is its materiality.

Mr. Gillen: Well, I have in mind the government produced a witness who was all packed up to leave the State for good, but he was suggesting to a juror in the Remmer case if he could get a few days off, to go hunting, if the juror could get this court to take a brief recess while they went hunting, and I am trying to learn what the season was, from a man who knows [173] what the hunting seasons were.

The Court: You had better get me the statute, if

(Testimony of Stanley Smith.)

you think it is important. Maybe that might be embarrassing to some people.

Mr. Gillen: No further questions.

JOHN H. NEWMAN

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. John H. Newman.

Q. Where do you live, Mr. Newman?

A. New Empire, Carson City.

Q. During the course of the trial of the United States of America vs. Elmer F. Remmer, were you chosen as alternate juror? A. Yes, sir.

Q. You did not participate in the deliberations of the jury at any time, did you? A. No, sir.

Q. Up to and including the time that you were discharged as an alternate juror, did you become acquainted with Irving J. Smith?

A. I did, sir.

Q. At any time during the course of that trial did Mr. Smith ever have any conversation with you, to the effect that a Mr. James A. Satterly had talked to him? A. No, sir.

Mr. Graves: Your witness. [174]

Cross Examination

Q. (By Mr. Gillen): Mr. Newman, there was another gentleman who served as alternate juror

(Testimony of John H. Newman.)

with you. What was his name? A. Mr. Morris.

Q. And you and Mr. Morris were not discharged until after the verdict was returned, is that right?

A. Yes, sir, we were; we were discharged as soon as the judge instructed the jury.

Q. Now did you at any time during the trial, and particularly a few days before Christmas, December of 1951, observe Mr. I. J. Smith walk into Judge Foley's chambers or come out of Judge Foley's chambers? A. No, sir, I did not.

Q. Were you at any time present, either in this building or in front of this building, in close proximity to Mr. Curnow and observe or hear Mr. Curnow being interviewed by a deputy United States Marshal, particularly Mr. Boyd?

A. Never heard anything; no.

Mr. Gillen: I think that is all.

Mr. Graves: No further questions.

ELTON L. MORRIS

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name, please? A. Elton L. Morris. [175]

Q. Where do you live?

A. 924 Humboldt Street, Reno, Nevada.

Q. And during the course of the trial of the United States of America vs. Elmer F. Remmer,

(Testimony of Elton L. Morris.)

were you selected and sworn in as an alternate juror? A. I was.

Q. And were you discharged before the jurors retired to deliberate on their verdict?

A. I was.

Q. And during the course of the trial, up to that point, you attended the trial every day, did you not? A. Yes.

Q. Did you become acquainted with Mr. Irving J. Smith, who later was foreman of the jury?

A. I knew Mr. Smith long before that.

Q. At any time during the course of that trial did Mr. Smith ever have any conversation with you concerning the fact that Mr. James A. Satterly spoke to him? A. No.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): You say, Mr. Morris, that you knew Mr. Smith long before the Remmer trial, was that what you said?

A. I did. I knew who he was.

Q. As a matter of fact, you are the Mr. Morris who, during *the* [176] *of* the trial, at times rode back and forth between Carson City and Reno with Mr. Smith, Mr. Tinkham and Mrs. Mack?

A. I am.

Q. However, you did not drive back with them on the night the verdict was returned?

A. No.

Q. Now did you, at any time during the Remmer

(Testimony of Elton L. Morris.)

trial, particularly within the week before Christmas of 1951, see Mr. Smith either going into Judge Foley's chambers or coming out of Judge Foley's chambers? A. I did not.

Q. Did Mr. Smith, Mr. Morris, at any time, after the Remmer trial was concluded, ever talk to you about having been approached by a person during the trial? A. After the trial?

Q. Yes.

A. After the verdict has been returned?

Q. Yes, sir. A. Yes.

Q. And did Mr. Smith talk to you, Mr. Morris, before it was brought to your attention by any other means? A. No, sir.

Q. Had you seen it in the newspapers before Mr. Smith talked to you about it?

A. I did. [177]

Q. And after you had seen it in the newspapers, did you then, upon meeting Mr. Smith discuss it with him?

A. Oh, possibly two weeks later we met; I asked him about it.

Q. You do recall that you asked him about it, is that correct? A. Yes.

Q. Did Mr. Smith tell you that the man who had approached him had told him that Mr. Remmer had sold Cal-Neva Lodge for 850 thousand dollars over the table and 350 thousand dollars under the table and that Mr. Remmer had 300 thousand dollars in cash that he daresn't expose or bring out?

A. No, sir, he did not.

(Testimony of Elton L. Morris.)

Q. Do you recall what Mr. Smith did tell you about this man who accosted him?

A. Not word for word.

Q. Well, did Mr. Smith tell you that the man told him if he strung along with Mr. Renamer as a juror in the case, that he could make himself a lot of money?

A. Well, there were words to that effect.

Q. By the way, do you know Mr. Satterly yourself?

A. I didn't know him until he was here, to know who he was.

Q. Do you mean by that you had seen Mr. Satterly before and not known him?

A. No, sir; to the best of my knowledge, yesterday is the first time I ever saw him.

Q. Did Mr. Smith say anything to you about what kind of a [178] Mr. Satterly was, in his opinion? A. No, I don't believe he did.

Q. Did Mr. Smith tell you that he felt that Mr. Satterly was trying to promote some kind of a proposition that might benefit him, Mr. Satterly, as well as Mr. Smith, and that he was feeling Mr. Smith out, seeing how susceptible Mr. Smith might be to such a proposal?

A. He didn't say it that way.

Q. Did he say anything to that general purport?

A. You are going a little bit over my head, but I will tell you what he did say.

Q. Let me reframe the question. Did he say something along that line?

(Testimony of Eaton L. Morris.)

Mr. Graves: We object——

The Court: If you want to ask him what he said.

Q. Tell me what he said, that is, in regard to what he thought about Mr. Satterly approaching him.

A. That he had known the man, that he joked a lot, that he evidently figured that it was a joke; the reason he took it to the judge, he kind of wondered if the man was feeling him out or wasn't feeling him out; he just wanted to know what to do about it, the reason he took it to Judge Foley.

Mr. Gillen: I think that is all.

Mr. Graves: No questions.

Recess taken at 11:10 a.m. [179]

After Recess, 11:25 a.m.

ROBERT L. McDONALD

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. By Mr. Graves: Will you state your name please?

A. Robert L. McDonald.

Q. Where do you live, Mr. McDonald?

A. Reno, Nevada.

Q. What is your profession?

A. Attorney at law.

Q. Were you formerly Assistant United States Attorney for the United States District of Nevada?

(Testimony of Robert L. McDonald.)

A. Yes, sir.

Q. Did you act in such capacity during the trial of the United States of America vs. Elmer F. Remmer? A. I did.

Q. Were you present throughout the entire trial?

A. Most of it, with the exception of a few days when I was sick.

Q. Now at any time Mr. McDonald, did you ever have a conversation with Irving J. Smith, one of the jurors, during this trial?

A. No, I did not.

Q. At any time were you ever present in Judge Foley's chambers when Irving J. Smith went in and discussed a matter with Judge Foley?

A. I was not. [180]

Q. Were you ever present with Judge Foley when he gave instructions to Bruce Thompson concerning investigation to be made concerning this particular incident? A. I was not.

Mr. Graves: No further questions.

Cross Examination

Q. (By Mr. Gillen): When was the first time you heard about this, Mr. McDonald?

A. I don't recollect the exact date, probably several days after the incident. I was riding home with Bruce Thompson and he mentioned the fact that somebody had discussed the case with Mr. Smith and the FBI were investigating.

Q. I believe we have established here in the

(Testimony of Robert L. McDonald.)

record that the incident was reported to Judge Foley by Mr. Smith on December 20, 1951 at 11:05 in the morning, and I believe that the record has established also that on the 21st and 22nd of December that Mr. Callister, the FBI special agent, had been called in and given certain instructions by Mr. Bruce Thompson and that Mr. Callister had made a report to Mr. Thompson on December 24, 1951, and also to Judge Foley on January 4th of 1952. Can you fix in your mind whether this was before or after Christmas that Mr. Thompson told you about this matter?

A. No, I can't, Mr. Gillen. My best guess would be before Christmas.

Q. Did Mr. Thompson ever talk to you about a report being received from Mr. Callister? [181]

A. No, he did not.

Q. Did you ever make any inquiries?

A. No, I didn't. I didn't even know that Mr. Callister investigated it until yesterday.

Q. Well, as one of the deputy United States attorneys who sat through the trial, were you curious or interested enough to ask Mr. Thompson whatever became of that matter regarding the juror, Mr. Smith?

A. Evidently not. I never did. Evidently I wasn't interested enough. I didn't discuss it any further with him, to the best of my recollection.

Q. Did Mr. Thompson, in relating that such an incident occurred, was brought to his attention, go into detail?

A. No, he didn't.

(Testimony of Robert L. McDonald.)

Q. Did Mr. Thompson tell you that it had been related to him that the person who accosted or approached Mr. Smith had told Mr. Smith that Mr. Remmer had sold the Cal-Neva Lodge for 850 thousand dollars over the table and 350 thousand dollars under the table and that he had 300 thousand dollars he couldn't bring to light?

A. No, he did not.

Q. You do recall throughout the trial that the accounts of the Cal-Neva ownership and management and financial affairs of Mr. Reminer were very eminently a part of the net worth period that was being advanced by the government? [182]

Mr. Graves: That is objected to, your Honor, on the grounds it is incompetent, irrelevant and immaterial, not proper cross examination, not within the issues of this case.

The Court: I will sustain the objection.

Mr. Gillen: No further questions.

Redirect Examination

Q. (By Mr. Graves): Mr. McDonald, Mr. Gillen asked you whether or not you were curious and asked Mr. Thompson about it. As a matter of fact, at that time you were so busy with other duties you didn't have time?

Mr. Gillen: Just a moment——

The Court: Well, I don't think that is material.

Mr. Graves: That is all.

BRUCE R. THOMPSON

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Bruce R. Thompson.

Q. Where do you live, Mr. Thompson?

A. 1550 Plumb Lane, Reno.

Q. What is your profession?

A. Lawyer.

Q. How long have you been a lawyer?

A. Since 1936.

Q. And were you formerly an Assistant United States Attorney [183] for this District?

A. Yes.

Q. And in such capacity did you participate in the trial of the United States of America vs. Elmer F. Remmer? A. Yes, sir.

Q. Were you in court every day during that trial? A. Yes.

Q. During the course of that trial, Mr. Thompson, did it ever come to your attention, an incident involving juror Irving J. Smith and one James A. Satterly? A. Yes.

Q. When did that first come to your attention?

A. Some time in December of 1951.

Q. How did it come to your attention?

A. We received a message at the United States attorney's office, in the postoffice, in this building, that Judge Foley wanted to see a member of the

(Testimony of Bruce R. Thompson.)

United States attorney's staff, and I went down to Judge Foley's chambers to talk with him.

Q. And at the time you went to Judge Foley's chambers, who was present?

A. Judge Foley, Miss Cooper, I believe, was there, and it is my recollection that some other attorney associated on behalf of the prosecution in the case was also present, but I am not sure of that and I don't recall who it was.

Q. Did Judge Foley then commence to tell you about this incident? [184]

A. Yes.

Q. Please state the conversation.

A. As I recall, Judge Foley told me that Irving J. Smith had come in to see him, stating that a man had spoken to him about the Remmer trial and that inasmuch as Judge Foley had previously admonished the jurors to report to him any effort on behalf of any one to talk to them about the trial, Mr. Smith thought it his duty to go into the Court. Judge Foley said Mr. Smith had told him a man named Satterly, who was an insurance client of Mr. Smith's had seen Mr. Smith at his home in the evening on a business matter and that during the course of the conversation the man Satterly had called attention to the fact that Mr. Smith was engaged as a juror in the Remmer trial and that it seemed to him there was a possibility for somebody to make money out of the case in that position.

Q. What else was said then?

(Testimony of Bruce R. Thompson.)

A. Judge Foley said that he had discussed the matter thoroughly with Mr. Smith and did not think it was a serious comment, that it had been reported to him only because of his constant admonitions to the jury, but that it was of such character he thought it should be called to the attention of our office, with the thought in mind that the background, previous associations of Mr. Satterly, should be investigated, for the purpose of determining whether or not he, Mr. Satterly, was a friend or business associate of Mr. Elmer F. Remmer, or if any of the people [185] in our office or the FBI knew to be former associates of Mr. Remmer. I told him that I would be willing to notify the local office of the Federal Bureau of Investigation of the incident, so that Mr. Satterly's background could be investigated. Judge Foley asked me whether I thought the attorneys for the defense should be notified of this pending investigation, and I told Judge Foley that in my opinion it was unnecessary and also improper, inasmuch as we were not investigating a juror, but investigating a man named Satterly, who might possibly have attempted a serious federal offense, and also that it was incumbent, from the point of view of our office, to find out the background of Mr. Satterly, so we would know whether it was important to watch him, to see whether it was an attempt to accost the juror.

Q. Was that the extent of the conversation between you and Judge Foley?

(Testimony of Bruce R. Thompson.)

A. That is the extent of the conversation which I recall.

Q. As a result of that conversation, what, if anything, did you do?

A. Well, we had to go back into court—according to my recollection this occurred some time during one of the trial days—and I believe it was the following morning. I left the office in Reno and communicated with the local office of the Federal Bureau of Investigation and requested an agent of that office to come to my office and discussed the matter with him. [186]

Q. And did they come to your office?

A. Yes, Mr. Callister did.

Q. What happened then?

A. I told Mr. Callister of the character of the incident that occurred and told him that we wanted the Federal Bureau of Investigation to investigate the incident, and to interview Mr. Satterly to find out all they could about Mr. Satterly's associates, his background, to aid us in determining whether or not he had really made a passing off-hand remark or was in some way associated with the defendant.

Q. Did Mr. Callister then leave you?

A. Yes.

Q. At a subsequent time did he ever make a report to you?

A. He did report to me. I don't recall the date. It is my recollection that Mr. Satterly was not available for interview, that he had gone to Oregon.

(Testimony of Bruce R. Thompson.)

and he had been unable to interview him, but that he had talked with people who knew him and who knew of his background and there was nothing that was reported to me at that time by Mr. Callister which indicated any connection between Mr. Satterly and the defendant.

Q. Did Mr. Callister say anything about having seen Mr. Irving J. Smith?

A. Oh, I know that he did see Mr. Smith. I guess he told me. It is hard to segregate these things, because later on, in March, he presented a written report to me, and that was a month or so [187] after the trial had been concluded.

Q. As a result of the investigation made by Mr. Callister of the Federal Bureau of Investigation, what, if anything, did you do?

A. I went over thoroughly what Mr. Callister and other agents of the FBI learned in the interview with Mr. Callister a month or so after the trial of the United States against Remmer was concluded, and reached the conclusion that nothing had been uncovered that warranted any further investigation or any criminal prosecution.

Q. And did you have any discussion with Judge Foley concerning that investigation at any time?

A. No.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gillen): Now, Mr. Thompson, your concern was whether or not there was a man by

(Testimony of Bruce R. Thompson.)

the name of Satterly who had committed some offense, is that correct?

A. That is correct.

Q. You weren't interested whether or not the incident had any impact or unfavorable effect upon the juror that was involved? A. No.

Q. You were not interested in that at all?

A. Judge Foley had already told me to his satisfaction it hadn't. [188]

Q. So you concerned yourself only with determining whether or not there was some evidence that would either involve Mr. Satterly or Mr. Remmer or somebody on the defense in a criminal offense, is that correct?

A. That is correct.

Q. Now, Mr. Thompson, you say you don't have specific dates on which these various things occurred in mind, is that correct?

A. That is correct.

Q. Now for the purpose of aiding you in your testimony, and possibly refresh your recollection, I might state to you—if I am incorrect, I would be glad to be corrected by counsel or the Court—according to the testimony that has been received here at this hearing, the incident between Mr. Smith and Mr. Satterly at Mr. Smith's home is supposed to have occurred on the evening of December 18, 1951. Mr. Smith is supposed to have mulled the matter over in his mind, and the record will show that he reported the incident to Judge Foley on the morning of December 20, 1951, at the

(Testimony of Bruce R. Thompson.)

hour of 11:05, presumably during a court recess. The evidence will also show—and this is also for the purpose of aiding you, Mr. Thompson—that you contacted Mr. T. Hiram Callister, the Special Resident Agent at Reno, Nevada of the Federal Bureau of Investigation, at 8:40 o'clock on the morning of December 21st, and that at that time Mr. Callister told you that he would have to get a clearance or authority, from Washington to launch such an investigation. Does that refresh [189] your recollection as to the times of the incidents?

A. Well, it doesn't refresh my recollection. It is possible that is true, if you have some record as to those statements, those could be the dates.

Q. This is testimony of the witness's very own memorandum. Then, according to Mr. Callister—I ask you if this refreshes your recollection—he said he did receive such authority and did launch such investigation on the day following, December 22nd, and that on that day he interviewed Mr. Irving J. Smith in Mr. Smith's office and that day was a Saturday, and that he made a report to you on December 24th, or Christmas Eve, as to his findings, and that his findings consisted, in his report, of information that he obtained from Mr. Smith and also of a personal check he made of credit and police records, that he made notes of those things and that he reported the matter to you and that you instructed him at that time that he should report personally to Judge Foley and determine whether Judge Foley desired the matter to be un-

(Testimony of Bruce R. Thompson.)

dertaken any further; that is, any further investigation undertaken. Does that refresh your recollection, the sequence of events and the incidents?

A. I recall telling Mr. Callister that he should report to Judge Foley. I do not know just when it was.

Q. Mr. Callister testified that after reporting to you and getting that instruction from you on December 24th, Christmas Eve, that he was unable, due to the intervening holidays, to [190] reach Judge Foley until January 4th of 1932, at which time he reported to Judge Foley in substance what he had reported to you. Now let me ask you, Mr. Thompson, you recall Mr. Callister reporting to you, do you not?

A. I recall he reported to me, yes.

Q. Now you recall that he reported to you that he had interviewed Mr. Smith?

A. That he interviewed Mr. Smith, yes.

Q. By the way, did you tell him to go and interview Mr. Irving J. Smith?

A. I think we discussed that and I told him that was the only starting point he had to find who Mr. Satterly was and what he had said and that he should talk to him.

Q. When he made his report, when he told you that he had interviewed Mr. Smith, he gave you the substance of the conversation with Mr. Smith, did he not?

A. I don't remember that he did or not.

Q. Do you remember that he had some notes

(Testimony of Bruce R. Thompson.)

from which he refreshed his memory in reporting to you?

A. Well, I never had an FBI agent interview me yet without notes.

Q. He wasn't interviewing you, he was reporting.

A. Well, reporting, conferring with me. I never had one confer with me, during all the time I was in the United States attorney's office, that he did not have notes.

Q. Did Mr. Callister give you any notes of his to read? [191] A. No.

Q. Did Mr. Callister tell you he took certain specific quotes from Mr. Smith and put them down in his notes? A. I don't remember.

Q. Did Mr. Callister tell you, "These things that I am relating now in substance are direct quotes from Mr. Smith", did he tell you that?

A. No, I don't remember.

Q. Do you recall that Mr. Callister reported to you that Mr. Smith stated to him that this man Satterly, in the course of discussing his insurance business with Mr. Smith, said to Mr. Smith, "Oh, you are over on the jury, aren't you", referring to the Remmer case, and Mr. Smith said, "Yes, I am busy every day." Do you recall that?

A. Well, that is substantially what Judge Foley said to me that he had said. Now I don't recall Mr. Callister specifically telling me that, Mr. Giller. He may have told me that.

Q. Now do you recall that Mr. Callister re-

(Testimony of Bruce R. Thompson.)

ported to you that Mr. Smith told him that Mr. Satterly had said to him: "I know Bones Remmer well", or "I know Bones Remmer very well. He sold Cal-Neva Club for 850 thousand dollars on top of the table, but he got 350 thousand dollars under the table and has 300 thousand dollars that he daresn't touch". Did he say that?

Mr. Graves: Your Honor please, I object to these question upon the grounds and for the reason Mr. Thompson has [192] already testified he has no recollection of this conversation or interview with Mr. Callister.

The Court: I don't see that it makes any difference, Mr. Gillen, whether he told him that, as far as this witness is concerned. What difference does it make? Except if it is only for the purpose of in some way impeaching the testimony of the FBI agent.

Mr. Gillen: No, your Honor.

The Court: If he said something different to this witness than he put in his report; otherwise, I don't see the materiality.

Mr. Gillen: Here is what we had in mind. I think we can develop before your Honor that the ownership and management of the Cal-Neva Lodge by Mr. Remmer played a very vital and important part in the matter of his income in the course of the trial and here we have a situation where there is a presumption that matters pertaining to the money in this Cal-Neva Lodge sale was not reported, a very important factor in the net worth

(Testimony of Bruce R. Thompson.)

matter the government was building up in the presentation of its case, had been brought to the attention of the juror by an outside person, who claimed to know very well about these things and who claimed to know there was 350 thousand dollars under the table and there was 300 thousand dollars that the man couldn't bring to light, because apparently obviously it was supposed [193] to be unreported income. Now I think we have a right to show here that these matters were reported as early as December, within a month after we started this three months' trial, and throughout this entire trial——

The Court: Reported to whom?

Mr. Gillen: Mr. Thompson, the prosecutor.

The Court: I don't see the materiality of that. What does that have to do with the question of the effect upon the jury? I suppose the United States attorney can get information any way he can get it. What has that to do with the jury? I can understand your point you are making is any impact on the jury, but I do not see it makes any difference whether the United States attorney knew about it or not. What does that have to do with the impact on the jury? It appears so far that there is evidence to the effect that that statement was made to the juror by this man Satterly, so that is there. Now for what that is worth, it can be taken into account on this issue, but whether the United States attorney knows about it from consultation with the FBI agent, what does that have to do with it. It

(Testimony of Bruce R. Thompson.)

is in the record for what it is worth. I have heard it. You don't have to belabor it from the point of view of bringing it up again, because I heard it.

A lawyer is sometimes in doubt a judge is listening, so he may ask it several times, but I have heard it.

Mr. Gillen: No, your Honor, I know when a matter is presented before your Honor, sitting without a jury or with a jury, that you hear it and get it.

The Court: I just think it is a waste of time.

Mr. Gillen: I may be a little over-conscientious in the results about this, but I have in mind——

The Court: (Interceding). I am not criticizing you for pursuing the matter. I just consider this immaterial. Maybe I am wrong about it.

Mr. Gillen: I have this in mind, your Honor, that the whole trend of the government's case has been to pooh-pooh the situation and to show your Honor everybody is willing, without even interviewing the suspect, to assume, without interviewing the man, that this is all a joke, without even interviewing the man who approached this man. To me, in my limited intelligence, that is very inconsistent with the proposition that these figures were mentioned and the contention of this man who made the approach, is supposed to know all these things that became so vital in the prosecution, and the defense was kept in the *ark* throughout all the trial.

The Court: To shorten the matter, you can take

(Testimony of Bruce R. Thompson.)

for granted I am going to assume what the FBI agent learned [195]. is what he said to the United States attorney and to the judge in the case. I assume that that is correct.

Q. Mr. Thompson, let me ask you this—did you personally know Mr. Satterly?

A. No.

Q. You did not?

A. No.

Q. You didn't know whether he was a jovial fellow, given to joking, or an assiduous character, serious in his talk?

A. I knew nothing about him then and I only know now what I remember of the FBI report.

Q. Mr. Thompson, did you have any further discussions with Judge Foley after this incident, after the report had been made to you by Mr. Callister? After Mr. Callister had made report to you of his findings, did you have any further interview with Judge Foley about the matter?

A. No.

Q. Did you go to Judge Foley and ask if he was satisfied the matter should be pursued no further or wanted anything further done or what Judge Foley thought of the matter?

A. I believe Mr. Callister did that.

Q. It is your recollection you did not mention it any more to Judge Foley and Judge Foley didn't mention it to you?

A. That is right. [196]

(Testimony of Bruce R. Thompson.)

Q. Now you were informed that Mr. Satterly was out of the State and had not been reached for an interview, is that correct?

A. Yes.

Q. You didn't instruct the FBI to make arrangements, being a nation-wide organization, to make arrangements to locate him and interview him?

A. I believe they did locate and interview him later. I am talking about some time about the middle of April, Mr. Callister reported.

Q. They interviewed him since the Supreme Court sent the case back here, but before that time I am talking about.

A. I think they located him, interviewed him within a couple of months, that is my recollection. I don't have any records or anything to refresh my recollection, but I think in the course of the investigation they did locate him.

The Court: The testimony is here already they didn't interview him until recently. I believe that was the testimony of the FBI agent.

Mr. Gillen: Yes, your Honor. We have this situation on the testimony. Judge Foley said it was his impression they told him they had interviewed him shortly after the incident.

The Court: Judge Foley said he didn't know as to the time, but he said subsequently the FBI agent informed him of that and I believe they had a statement. [197]

(Testimony of Bruce R. Thompson.)

Mr. Gillen: And Mr. Satterly said he wasn't interviewed until a month or six weeks ago.

The Court: I don't think there is any testimony on that.

Q. Now, Mr. Thompson, did you disclose to the press, the newspapers, or any representative of the newspapers, this incident at any time?

A. No.

Q. Did it come to your attention immediately after the close of the trial that there was a story or account of this incident in the daily newspapers?

A. Yes, I believe there was an article about it in the local Reno paper.

Q. You also saw it in the Examiner of San Francisco?

A. I do not customarily see the Examiner.

Q. Did anybody approach you before the trial was over, any newspaper representative, and ask you if you had heard any such matter as the Mr. Smith incident? A. Yes.

Q. And who was that?

A. Well, it was a man named Lynn from the Examiner, who attended this trial.

Q. Max Lenn.

A. He was the most annoying one of the reporters who was present.

The Court: Can't we get along. This is interesting, [198] but again I think——

Mr. Gillen: Just one more question on the subject.

Q. Did Mr. Lenn ask you about the Smith inci-

(Testimony of Bruce R. Thompson.)

dent before the jury was given the case for its deliberation?

A. I don't believe so. I believe he asked me about it while the jury was out, is my recollection.

Q. It is your recollection it was while the jury was out that he asked you about it?

A. Yes, sir. He didn't ask me about the Smith incident either, so there will be no misunderstanding—he tried to pump me about some outside information, some outside talk with a juror.

Q. Did you say you knew something about it or didn't know? A. I just refused.

Q. And said, "No comment."

A. It was a personal matter.

Q. Did anything come to your attention, during the course of the trial, with regard to a deputy United States marshal questioning one of the jurors as to whether or not anybody had approached him, or he had heard anybody approaching any of the jurors, regarding the Remmer case? A. No.

Q. Did you report to the United States marshal's office the investigation that was in progress, concerning the incident revolving around Mr. Smith? A. No. [199]

Q. Do you know how that information came to the knowledge of the United States marshal?

Mr. Graves: Your Honor, we object—there is no testimony it ever came to the knowledge of the United States marshal.

Mr. Gillen: There certainly is.

(Testimony of Bruce R. Thompson.)

The Court: I will sustain the objection. It is immaterial.

Q. At all events you—by you, the United States attorney's office,—so far as you are concerned, or so far as within your knowledge, never instructed the United States marshal or any deputies to do anything?

The Court: He already said no. That is already covered.

Mr. Gillen: I think that is all.

Mr. Graves: No further questions.

(Noon recess.)

Afternoon Session, June 8, 1954, 1:45 p.m.

Defendant and all attorneys present.

MILES N. PIKE

a witness on behalf of the government, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Graves): Will you state your name please?

A. Miles N. Pike.

Q. And where do you live, Mr. Pike? [200]

A. Reno, Nevada.

Q. What is your profession?

A. I am an attorney-at-law.

Q. And for some time past, past years, were you United States attorney for this District of Nevada?

A. Yes, I was United States attorney for this

(Testimony of Miles N. Pike.)

district from about August, 1939 to February, 1942, and from March, 1945 until January 14, 1953.

Q. And in connection with your official duties as United States attorney for the District of Nevada, did you participate in the trial of the United States of America vs. Elmer F. Remmer?

A. Yes, I was in attendance for a portion of the trial. I was in attendance during all the court days commencing with the 28th of November of 1951 to and including the 20th day of December of that year.

Q. And on the 20th day of December, 1951, did you then cease your participation in this trial?

A. Yes; due to sickness.

Q. Up to that point had you any knowledge of any incident occurring, involving the juror Irving J. Smith and one James A. Satterly?

A. Not according to my recollection by the name of the juror being Mr. Smith at that time. I have this recollection of the incident—a government attorney told me here in the courtroom, [201] while I was in attendance at the trial, that some person had talked to one of the jurors concerning the trial, and the juror had reported it to Judge Foley, who either had reported the matter to the FBI for investigation and report, or intended to so report it for investigation and report.

Q. Did you at any time, yourself, Mr. Pike, have any conference with Judge Foley concerning this incident?

A. I have no recollection of any such discussion.

(Testimony of Miles N. Pike.)

Q. So you were never present at any time when Judge Foley talked to Mr. Thompson about the matter?

A. To the best of my knowledge I never was. I have no recollection of any such.

Q. Or were you present at any time with the juror, Irving J. Smith, went into Judge Foley's chambers?

A. As I say, I have absolutely no recollection. The only recollection I have of any matters in connection are matters which I already stated.

Q. What was the policy of your office at that time in respect to prosecuting contempt?

A. Of course, like any other cases involving violations of law, it necessarily involved investigation and proper action would follow the result of the investigation.

Q. Did you, subsequent to December 20, 1951, ever familiarize yourself at all with any of the details or reports or any statements involved in connection with this incident? [202]

A. No, I do not think I ever did. I was confined to my bed at home for a number of weeks, commencing with the night of December 20, 1951. I had what I considered to be a very competent staff and complete assistance in the office, and they took care of the government's interests in this case, as well as other cases in the office, so that when I returned to work, which was, as I recall, several months after being taken sick, I kept busy with

(Testimony of Miles N. Pike.)

current work in the office, but not review of this case.

Q. At that time was Mr. Bruce Thompson your chief assistant United States attorney?

A. Yes, that is correct, and Mr. William Kane and Robert McDonald and Mr. Walter M. Campbell were likewise assistant United States attorneys.

Mr. Graves: You may cross examine.

Cross Examination

Q. (By Mr. Gillen): Mr. Pike, you say that you were stricken on the night of December 20th?

A. I don't know about being stricken. I had a heart attack that night.

Q. On the night of December 20th?

A. Yes, that is right. I was in attendance here at court the court day, Thursday, December 20th.

Q. Now, Mr. Pike, the record here will reveal, from the testimony of witnesses, that the so-called Smith episode, where Mr. [203] Smith's discussion with Mr. Satterly took place on December 18th at Mr. Smith's home and Mr. Smith reported it to Judge Foley at 11:05 on the morning of December 20th, and from the testimony of Mr. Thompson, I guess it was, at your office in this building, that is your official office in this building, he received a request, a message, that Judge Foley desired to see a representative of your office in his chambers. Did it ever come to your attention on that date?

A. Well, the only way I could answer that would be this—I recall some one rather definitely, one of

(Testimony of Miles N. Pike.)

the government attorneys, telling me what I have just stated. I don't recall being in the United States attorney's office and receiving such a message as you refer to and, of course, I didn't hear the evidence that you refer to, but if that took place on December 20th, I was here all that day.

Q. You had not been incapacitated by this attack until that evening?

A. No, that is right.

Q. And you have no recollection of Mr. Bruce Thompson coming to you and saying, "Judge Foley has advised me of an incident that was reported to him by a juror and it has been determined that it should be turned over to the Federal Bureau of Investigation"?

A. I wouldn't say positively it was Bruce Thompson, no, but my thought is that it was Bruce Thompson, because Bruce was the first assistant United States attorney and we divided the duties [204] in connection with the trial, and some government attorney told me what I have recounted while I was here in the courtroom. My recollection was that it was during some sort of a recess, whether it was during the noon recess or other recess, I don't know and I would not be able to fix the date, except for what you have indicated.

Q. Judge Foley fixed that date from a memorandum that was made at his suggestion or direction at the time. Now, Mr. Pike, when this matter was called to your attention, you didn't make in

(Testimony of Miles N. Pike.)

quiries yourself of Judge Foley as to what occurred, or take any active participation?

A. No, I have no recollection of doing anything of that sort, because the information as was given to me was that Judge Foley either had already referred it to the FBI for investigation and report, or that he intended to do so, and that information, coming to me from the source it did, satisfied me that that was the proper channel for it to be placed into and there was nothing further for me to do until there was a further development.

Q. You were the chief executive law enforcing officer in this district at that time?

A. That is correct, and as United States attorney I had very definite responsibility, but if I received that word, as I stated, from Bruce Thompson, that was sufficient for my purpose, the FBI would be the proper agency to investigate and report on it. [205]

Q. Mr. Pike, did you make any inquiries, when you received this information, as to whether or not there was anything about the incident or matter that might have an effect or improper impact upon the juror who was involved in this experience.

A. No, for the same reason, that it was in the process of investigation. I didn't wish to constitute myself an investigating officer or agency. I knew, from what had been told me, that it would be handled by the FBI.

Q. You were, by the force of your office, a constituted officer to make investigations?

(Testimony of Miles N. Pike.)

A. Well, not in my opinion. I think there are certain government agencies——

The Court: Well, I think that covers it.

Mr. Graves: No further questions.

Mr. Gillen: That is all.

## HUBERT BOYD

a witness on behalf of the government, being duly sworn, testified as follows:

### Direct Examination

Q. (By Mr. Graves): Will you state your name please? A. Hubert Boyd.

Q. Where do you live, Mr. Boyd?

A. Las Vegas, Nevada.

Q. What is your business or occupation?

A. I am deputy United States marshal.

Q. For the United States government? [206]

A. Yes, sir.

Q. And for the State of Nevada?

A. For the District of Nevada.

Q. How long have you been so employed?

A. Since July 5, 1936—it will be nine years.

Q. Now directing your attention to the trial of the United States of America vs. Elmer F. Renamer, did you, in your official capacity, attend that trial?

A. As I recall, about 50 or 60 per cent of the time. Our duties went on as usual over that eleven-week period, I think it was, or three months, bringing prisoners here to court and committing them to

(Testimony of Hubert Boyd.)

different institutions throughout the United States where they were assigned.

Q. And at that time, which was in 1951 and early 1952, where were your living?

A. In Reno, Nevada.

Q. And was your official office here in Carson City, Nevada?

A. My official office was in Reno and we came back and forth.

Q. Now during the course of this hearing, Mr. Boyd, a statement was introduced in evidence, defendant's Exhibit No. F, by one Richard Curnow. Do you know Mr. Richard Curnow?

A. Yes, I do.

Q. How well do you know him?

A. I believe since around '48. I attended a pistol match at Winnemucca and met him there at that time. [207]

Q. And have you seen him frequently since that time and the time of the trial?

A. At different shooting matches throughout the State. There was a lot of rifle shooting and I shoot most pistol matches and I have an admiration for his rifle shooting and talked to him and got acquainted with him at that time.

Q. During the course of the trial, did you ever have any conversation with Mr. Richard Curnow?

A. I had talked to him during the course of the trial here in the office and outside several times. All that was concerning shooting.

Q. Mr. Boyd, I hand you here defendant's Ex-

(Testimony of Hubert Boyd.)

hibit F, and ask you if you will read it please. Directing your attention to the portion of this exhibit which reads as follows: "I do recall that during the trial, I was asked by Deputy United States Marshal Hugh Boyd whether I had heard of anyone being contacted, that is, anyone on the jury." Do you, Mr. Boyd, recall ever having made such a statement to Mr. Curnow?

A. I do not. There are one or two reasons for that, in that the United States marshal and no deputy United States marshal is allowed to converse with a juror concerning the case, any case whatsoever. That is the first reason; and the second one is I had not ever heard of any alleged violation.

Q. Did you at any time learn that there was an incident involving a juror in that Remmer trial?

A. No.

Q. Did you, at any time after the trial, learn of such an incident?

A. I heard that and I think possibly I read it. I heard it soon after the trial.

Q. Directing your attention to this statement: "Mr. Boyd also asked me whether any one on the jury had discussed anything indicating that someone on the jury had been contacted."

Mr. Gillen: This is rather an unusual mode of examination, your Honor, of his own witness.

The Court: You mean this reading?

Mr. Gillen: No, it is worse than that, your Honor. It is cross examination and type of impeachment examination of his own witness before his own

(Testimony of Hubert Boyd.)

witness has an opportunity—he takes a document that another witness he has called has made, in the form of a statement to a government agent, and he is cross examining this witness he has called from that document.

The Court: I think the United States attorney is required to follow the course of presenting the case. He is apparently presenting all the witnesses that know anything and letting them state everything they know about it and this has wide latitude, due to the very exceptional nature of the inquiry as remanded by the Supreme Court. I rather think it is something that you should be more inclined to [209] welcome than to criticize?

(Last question read.)

Q. "I answered Mr. Boyd in the negative, since no such matter had come to my attention." I ask you whether you ever made such a statement to Mr. Curnow? A. No, I did not.

Mr. Graves: Your witness.

Cross Examination

Q. (By Mr. Gilden): Mr. Boyd, did you know Mr. Curnow better than any one else on the jury; that is, you were better acquainted with him than any other member of that jury?

A. I believe possibly I would be better acquainted than any other member.

Q. And you had been in his company, at least had participated with him in rifle and pistol shooting, is that correct?

(Testimony of Hubert Boyd.)

A. Yes, sir, that is correct.

Q. And he has won medals and citations, isn't that true? A. Yes.

Q. And you were interested in that particular form of recreation?

A. Yes, that is a hobby of mine, too.

Q. Have you had an opportunity to read this statement, Mr. Boyd? A. Yes, sir.

Q. Did you just read it in the courtroom here?

A. Just in the courtroom here.

Q. Is it your testimony, Mr. Boyd, that you presently have a definite and independent recollection that the conversations related in this statement given by Mr. Curnow to the Federal Bureau of Investigation special agent McGee never took place?

A. Oh, I don't know about his talking to McGee.

Q. No, I am talking about his account of what is supposed to have transpired between you and him. Is it your testimony that that never took place?

A. That testimony never took place.

Q. I think you mean the incident he referred to.

A. That is right, the incident.

Q. When I say the "incident", I mean that you contend that it is not true, as he stated, that you spoke to him during the trial and put these questions to him.

A. I didn't talk to him about this case, or any other case at any time.

Q. Mr. Boyd, were you interviewed by special agent McGee? A. No, sir.

(Testimony of Hubert Boyd.)

Q. You never were? A. No, sir.

Q. Before being called to the witness stand here today, did you discuss this particular incident that involved you with Mr. Curnow or any one else?

A. No, sir. [211]

Q. Did you discuss it with the government counsel? A. I did, yes.

Q. And when was that?

A. This morning.

Q. What was the nature of the discussion?

Mr. Graves: Just a moment. We have no objection, actually, to that, but as a matter of objection, for the record, I think it is an improper question. I think counsel has a right to interview witnesses in the presentation of the case, your Honor.

The Court: Well, counsel for the defendant is on what might be called a fishing expedition, I suppose, and since this is a most peculiar type of inquiry, it might be he might elicit something that this witness might have said, a different sort of statement than he has made here. I don't know. Well, answer the question, what you talked about with the United States attorney on the subject.

A. We sat in the back of the room and he asked me if I heard the testimony and I said I did and he asked me if it was so and I told him no, it was not.

Q. Did he show you any document, other than the statement Mr. Curnow gave to Mr. McGee?

A. No, sir.

Q. By the way, Mr. Boyd, during the course of

(Testimony of Hubert Boyd.)

this trial, did [212], you ever observe any other marshal, or did it come to your attention that any other marshal did, or might have had, this very discussion with Mr. Curnow?

Mr. Graves: That is objected to, your Honor, on the basis it is incompetent, irrelevant and immaterial, not within the issues of this hearing and no proper foundation laid.

Mr. Gillen: I think everything is at issue in this hearing. It is a general inquiry.

The Court: I will allow the question.

A. I do not believe I would have any way of knowing.

The Court: The question, did you see anything?

A. No, sir.

Q. Mr. Boyd, I believe you answered that you did not know about the so-called Smith incident until after the trial was over, is that right?

A. That is correct.

Q. Now since you did not know anything about the Smith incident until after the trial was over, I take it that in the month of December of 1951 and the month of January, 1952 and the month of February, 1952, up to the close of the trial on February 22, 1952, you were not curious about Mr. Smith, or any other juror, having been approached by any outside person concerning the trial, is that correct?

Mr. Graves: Objected to as immaterial.

The Court: Well, I think that is an argumentative question. [213]

(Testimony of Hubert Boyd.)

Mr. Gillen: I have in mind, your Honor, that the testimony Mr. Curnow gave this morning, what appears in this statement, was to the effect that deputy marshal, Mr. Boyd, expressed himself as being curious about the incident.

The Court: He said he didn't have that conversation.

Mr. Gillen: That is true, but Mr. Curnow said there was a conversation, he asked Mr. Boyd why he wanted to know and Mr. Boyd said, "I am curious."

The Court: He said he didn't have that conversation.

You can't do anything about that. He will have to deny it.

Mr. Gillen: That is true, but it does conflict with what Mr. Curnow says.

The Court: Apparently.

Mr. Gillen: That is all.

Redirect Examination

Q. (By Mr. Graves): During the conversation you had with me in the back of the room this morning, is it not a fact you also made the statement at that time you would like to take a lie detector test? A. I certainly did.

Mr. Gillen: I might state lie detectors are very unreliable.

The Court: We won't go into that either.

Mr. Graves: At this time the government has no more witnesses. [214]

The Court: Do you wish to put on any witnesses?

Mr. Gillen: Yes, we do have some brief testimony. We would like to call Mr. Spurgeon Avakian.

SPURGEON AVAKIAN

a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gillen): Will you state your full name?

A. Spurgeon Avakian.

Q. And Mr. Avakian, will you state where you reside?

A. I reside in Berkeley, California.

Q. With whom do you reside there?

A. With my family, wife and three children.

Q. What is your business or profession?

A. I am an attorney at law.

Q. Where do you have your offices?

A. Financial Center Building, Oakland, California.

Q. You are licensed to practice law in all the courts of the State of California and federal jurisdiction and also other jurisdictions?

A. Those mentioned and the United States Supreme Court and certain regulatory agencies and the tax court.

Q. And do you specialize in any particular field of your profession?

A. Yes, sir, the field of taxation.

Q. And for any period of time in that specialty.

(Testimony of Spurgeon Avakian.)

did you serve [215] the United States government?

A. Yes, sir, I did.

Q. When and where and in what particular capacity?

A. I worked for the United States government for a little over five years, of which three years, from January, 1944 until November of 1946, were spent as a special agent to the Attorney General in the Tax Division in Washington, D. C.

Q. You also taught the subject?

Mr. Graves: Your Honor, I do not like to interrupt, but the government objects to this line of examination upon the ground and for the reason that he is qualifying this man as an expert. I can't see for what purpose.

The Court: I have an idea he just wants the witness to state his background, as going to testify to some fact of the case.

Q. Do you have the question in mind?

A. Yes. From December, 1946 until the spring of 1952 I was instructor in taxation at the University of San Francisco, School of Law. Approximately since about 1946 I have also been an occasional lecturer, on a guest basis, in tax cases at the University of California, School of Law, Berkeley.

Q. Mr. Avakian, were you called in, in your capacity as specialist on tax law, to assist Mr. Golden and myself in the case of the United States of America against Elmer F. Remmer?

A. I was. [216]

Q. And you did certain preparatory work and

(Testimony of Spurgeon Avakian.)

participated as one of the active counsel throughout the trial, is that correct? A. Yes, sir.

Q. And through appellate proceedings since that time, is that true? A. Yes, sir.

Q. Mr. Avakian, in the month of December of 1953, did you, in the course of continuing your participation in the Remmer case and its aftermath, come from California to Reno, Nevada, and interview certain persons who had served as jurors?

A. Yes, sir.

Q. Will you tell us what persons you interviewed?

A. Mr. Irving F. Smith and Richard Curnow.

Q. Which person did you interview first?

A. Mr. Smith.

Q. Will you tell us where you located Mr. Smith, the *approximate and* the circumstances?

A. I talked to Mr. Smith in his office in Reno on December 15, 1953, from approximately 11:30 in the morning until 12:00 noon. The conversation took place in Mr. Smith's private office in the back part of the real estate and insurance offices that he has there. Mr. Smith met me in the front part of the office and escorted me in to his private office. There was no one else present besides us.

Q. Relate, as best you can, and if you made any notes at the [217] time and find it necessary to refresh your memory from those notes, I am sure the court will permit you to do so, what was said between you and Mr. Smith.

A. I might say I did not take any notes during

(Testimony of Spurgeon Avakian.)

the conversation, but immediately after lunch on that day, I dictated a memorandum of the conversation to the secretary of George Lohse, who was associate counsel, in Mr. Lohse's office in Reno, and I do have that memorandum before me.

Q. All right.

A. After we had exchanged usual pleasantries, I told Mr. Smith I had come there for the purpose of talking to him regarding the incident of his having been contacted during the trial by some person, as reported in the press.

Q. Did you know the name of that person at that time? A. I did not.

Q. When did you first learn the name of that person?

A. In court yesterday. Mr. Smith said that he would be glad to talk to me about the matter. I told him that at that time, the case being before the United States Supreme Court and that the United States government, in filing its brief in opposition to our petition to the United States Court to hear this matter, had made the statement, in substance, that if any such contact between an outsider and member of the jury had actually occurred, the defendant should have presented affidavits of jurors to prove that fact, and I showed him the government's briefs and [218] pointed to the particular language that I had in mind, and I told him that we did not want to be in the position of having the United States Supreme Court conclude that no such incident actually occurred and

(Testimony of Spirgeon Avakian.)

for that reason I would like to find out from him exactly what had happened, and I would like to draw an affidavit and have him sign it to that effect. He told me he would be very glad to tell me the facts and he related to me substantially as follows: He said that during the trial a man, an insurance client, had called at his home one evening to discuss with him a matter involving insurance, and then during the course of the conversation had made the remark to him in substance that Mr. Smith should be able to make a lot of money for himself out of the Remmer trial. Mr. Smith said that he knew that this man was acquainted with Mr. Remmer. He didn't think that Mr. Remmer had sent this man to him, but the thought went through his, Mr. Smith's, mind that this man was trying to promote something for himself and was feeling out Mr. Smith, with the idea that if Mr. Smith was at all responsive, this man might then go out and contact Mr. Remmer and try to promote some sort of arrangement that would benefit the man that was talking to Mr. Smith. He did not give the man's name, but he did mention, in passing, there was another man in Reno by the same name, who had taken a lot of ribbing on account of this incident. I asked Mr. Smith again if he would be willing to sign an affidavit relating these facts and he said he would [219] be glad to, but first he would like to discuss this with his wife, to refresh his recollection of it, because the event had occurred before her, and he would also like to talk to his attorney,

(Testimony of Spurgeon Avakian.)

Sidney Robinson: I asked Mr. Smith if he had reported this incident to Judge Foley during the trial. He said he had; that Judge Foley had called in his secretary and had him repeat his version of the incident to the secretary, who wrote it down. I asked him if he had been contacted thereafter during the trial by anybody else and he said an FBI man, whose name he did not recall, had called upon him at a time, which he thought was during a long recess which occurred in the trial, on account of bad weather, and talked to him in his office about the matter. He said he had related these facts to the FBI man. I asked him if thereafter anybody had talked to him further about the matter, before the end of the trial. He said nobody had. I asked him if anybody, Judge Foley or the FBI or any one else, had informed him, before the end of the trial, the results of the FBI investigation, or of any conclusion which had been reached, and he said he had not received any information in that regard. I left Mr. Smith's office, with the understanding that some time that afternoon I would call his attorney, allowing enough time for Mr. Smith first to contact the attorney, and I did contact his attorney at approximately the middle of the afternoon.

Q. Now when you contacted Mr. Robinson, did you read to Mr. [220] Robinson any form of affidavit that you had prepared for Mr. Smith's consideration, based on what Mr. Smith had told you?

A. Not that afternoon, but I did the next morning.

(Testimony of Spurgeon Avakian.)

Q. What did you do?

A. When I talked to Mr. Robinson that first afternoon, I related to him what Mr. Smith had related to me. I showed him the government's brief and also showed to Mr. Smith, and Mr. Robinson said he would like to read a little law on this legal point that was involved and he would talk to me further after doing that. I told him I would go back to Mr. Lohse's office and quote him the citation on some of the pertinent cases on this point, which I did do the next morning.

Q. Did you prepare an affidavit for Mr. Smith to sign on the basis of what he related to you?

A. Yes, I did.

Q. Did you deliver that to anybody?

A. To Mr. Robinson the following morning, December 16th.

Q. In what form was that?

A. I think that was on yellow lined paper, taken from a legal tablet, two pages in longhand.

Q. What, if anything, was done with that by Mr. Robinson in your presence?

A. Mr. Robinson read it.

Q. By the way, was Mr. Smith present when you presented it? A. No, sir. [221]

Q. Just you and Mr. Robinson in his office at Reno? A. That is correct.

Mr. Graves: Objected to as immaterial, because Mr. Smith never signed. What difference does it make what the affidavit says?

The Court: I think I am in agreement. I don't

(Testimony of Spurgeon Avakian.)

see any materiality as to conversation between attorneys. It is just a question what happened, not what conversations were had between attorneys.

Mr. Gillen: May I say this, your Honor. In this particular incident there was an inference invited that Mr. Avakian may have prepared an affidavit containing matters that Mr. Smith had never related to him.

The Court: That is a collateral issue.

Mr. Gillen: We wouldn't want your Honor to gain an impression — we wanted your Honor to know.

The Court: I do not think you need be concerned in that regard. You see enough minor differences involved in words and phrases and those things happened. I say this merely because up to this point I don't see any particular conflict in any of the facts as to what happened, no substantial conflict of any kind. It is a minor matter, in which there is some conflict, but substantially any of those things which occurred are not in conflict. I do not see [222] any point in taking up time with Mr. Avakian's activities in connection with the matter. I am not going to decide this case from any inference as to what any attorneys did themselves in connection with the preparation of all these affidavits. I do not want to dissuade you from presenting anything you think material. I do not know what is in your mind, but I do not see any necessity of recounting what took place between Mr. Avakian and this other man, discussing an affidavit that was being prepared.

(Testimony of Spurgeon Avakian.)

Mr. Gillen: I will say this, your Honor, primarily what I wanted to get before your Honor from this witness was that there was a contention made by Mr. Smith regarding his alleged belief that this was all a joke and that he did not suspect certain ulterior things on the part of Mr. Satterly. We want to show to your Honor that Mr. Avakian receives this information, that Mr. Smith did consider ulterior motives on the part of Mr. Satterly and correction eliminating that was made by his lawyer, merely because the lawyer thought it was a thought of Mr. Smith's and had no place in the affidavit, and not because it did not happen; that is, not because Mr. Smith had not so told Mr. Avakian.

The Court: He already testified that he considered the matter more or less a joke, but nevertheless it [223] might be vital, and having that in mind, he reported the matter to Judge Foley. I don't see any conflict between what Mr. Avakian says in that regard and what anybody else has said. He may not have said it to Mr. Avakian, but he did say it here in this court.

Mr. Gillen: Then I will go into another topic with Mr. Avakian, if your Honor is satisfied with what occurred, that is perfectly sufficient.

The Court: As long as I understand what is in your own mind.

Mr. Gillen: That is what I mean.

Q. Mr. Avakian, did you, on the occasion of this same trip to Reno, in connection with the Rommer

(Testimony of Spurgeon Avakian.)

case and the appellate aspects of it, interview any other juror? A. Yes, Mr. Curnow.

Q. And will you relate to the Court when and under what circumstances you interviewed Mr. Curnow?

The Court: Mr. Curnow has already said so—just ask him what he said. You can skip it if that is the point you want to develop.

Mr. Gillen: That is the point, your Honor.

Q. Mr. Avakian, what did Mr. Curnow say to you with regard to any contact he had with any outside person, concerning the Remmer trial, during the time he was a juror. [224]

A. Mr. Curnow said that approximately half way through the trial the assistant United States marshal had asked him whether any one had tried to contact him or approach him about the case. Mr. Curnow said he told the assistant marshal that no one had and asked him why he was asking and he said the assistant marshal replied in substance: "He tried to bribe one of the jurors." I asked Mr. Curnow if he would be willing to give me a written statement or affidavit to that effect. He replied that he did not want to give me a statement in writing on that because he didn't feel that this incident had prejudiced him and if we got a new trial on account of this incident, he was just giving me a loop hole to get a new trial for Mr. Remmer on a technicality. We had additional discussions because I also told him the matter should be passed upon by the courts rather than himself. He was very pleasant, very

(Testimony of Spurgeon Avakian.)

nice, but he said the Remmer trial had caused him considerable grief; at a time when he had personal tragedy in his home and cost him a lot of income because he was away from his business and he just was sick and tired of the whole thing.

Q. Was there any mention made of the fact that he declined to sign or had considered signing an affidavit earlier at the solicitation of some other counsel in the case?

Mr. Graves: Your Honor, we object on the ground it is immaterial. He did sign a statement—it is in evidence. I do not think that is material.

The Court: That is a collateral matter. It is immaterial. I think it really would have no material bearing on it.

Mr. Giffen: I think that will be all.

Cross Examination

Q. (By Mr. Graves): Mr. Avakian, I believe you said you were a tax specialist, are you?

A. Yes.

Q. You are not familiar with trial techniques?

The Court: Don't ask that question.

Q. When you went around to see Mr. Smith, you were there to get an affidavit from him, were you not? A. If I could, yes, sir.

Q. Wasn't one of the first questions you asked him was, "Who was the man that contacted you"?

A. No.

Q. You never asked him that?

A. No. He mentioned this remark about there

(Testimony of Spurgeon Avakian.)

being some one else having a similar name in Reno, more or less parathentically, and the name of the man was not important to me. The important thing was to show, contrary to the contention the government was then making in the brief, there actually had been contact.

Q. That was in spite of the fact that the motion for new trial was filed, despite the fact there had been various communications; [226] asking for the name of this man, you still did not think it important enough to ask Mr. Smith who it was.

Mr. Gillen: We object to the question in this form. It is argumentative.

The Court: Yes, it is argumentative.

Mr. Graves: I will withdraw the question, your Honor.

Q. And your interviews with Mr. Smith and Mr. Curnow were in December, 1953, is that correct?

A. Yes, sir.

Mr. Graves: That is all.

Redirect Examination

Mr. Gillen: I overlooked one thing I wanted to develop from Mr. Avakian. If I have your Honor's permission to do that, I will be very brief.

The Court: All right.

Q. Mr. Avakian, in connection with participating in the Remmer trial, your part in the trial was chiefly concerned with the technical tax aspects of the case, is that not correct?

A. Yes, sir, it is.

(Testimony of Spurgeon Avakian.)

Q. And in connection with the government's theory, on the basis of the so-called net worth theory, did Mr. Remmer's ownership and managementship of the Cal-Neva Lodge at Lake Tahoe play a prominent part?

Mr. Graves: Your Honor please, we object on the ground and for the reason it is incompetent, irrelevant and immaterial, [227] not within the issues of this case, going into something that was——

The Court (Interceding): I don't see how I can take that testimony. That would involve determination and effect of the testimony in the case itself——

Mr. Gillen: I would like to explain that theory, your Honor.

The Court: I think you have already done that, haven't you? You said that you were concerned with this statement that was supposed to have been made by Mr. Satterly to Mr. Smith, concerning the defendant Remmer's interest in his Cal-Neva project, and you said before that that had some important bearing on the matter because the jury had been informed about a matter that entered into the case itself.

Mr. Gillen: Yes, your Honor. Here is our thought in the matter——

The Court (Interceding): But I still do not see what possible materiality there can be to the witness' opinion as to whether that was an important matter in the case.

Mr. Gillen: I was going to have this witness identify certain exhibits that involved the Cal-Neva

(Testimony of Spurgeon Avakian.)

enterprise, what part it had in building up of the government's net worth theory, and I feel——

The Court: I do not like to interrupt you, counsel, but [228] it isn't the government's theory about the matter that is involved, so far as this case is concerned. The purpose at issue is the merits of the case presented before the Supreme Court, and I do not think it would be proper—I think it would be presumptious on my part—to try to determine whether or not some particular item of evidence in a three-month trial was something that was important in the case. After the case goes back to the Supreme Court, you could make a contention as to the importance as to that matter, but I can not make any finding on that.

Mr. Gillen: Our thought is this, your Honor—Mr. Smith, it develops from one witness, who appears to be a very honorable witness, Mr. Callister, told Mr. Callister he had told nobody else about this interview with this man Satterly, and we hear for the first time from Mr. Callister, and it is in his notes and it is encircled with——

The Court: Quotation marks.

Mr. Gillen: Yes, to indicate the exact quote of Mr. Smith, that Mr. Smith is supposed to have been told by Mr. Satterly that Mr. Remmer, the man on whose fate Mr. Smith is sitting in judgment, had sold Cal-Neva for 850 thousand dollars above the table, 350 thousand dollars below the table, being unreported amount of money, and over and above that he had another 300 thousand [229] and which,

(Testimony of Spurgeon Avakian.)

the expression was used, that he (quote) daresn't bring to light, and Mr. Smith is called upon to state how those things were brought to his attention very early in the trial, before it was in progress four weeks. The mention of the fact that Mr. Remmer had money under the table he daresn't bring to light, is sufficient impact on a jury, and we want to show your Honor that the very thing that was referred to, according to Mr. Smith, by this Mr. Satterly, was the thing that was a great big issue in the case throughout the three months of the trial.

The Court: I understand that, but I am still not going to take the witness's opinion in considering the matter. If it becomes necessary to evaluate, I will read the record myself.

Mr. Gillen: We had this in mind, you were not the presiding judge and could not have known, and we thought we would introduce that and save your Honor the trouble of having to wade through it, and we merely had one of the lawyers——

The Court: I have tried a lot of tax evasion cases. I think I can find out from the record myself.

Mr. Gillen: Does your Honor want me to identify the pages of this document for the record?

The Court: If you wish to.

Mr. Gillen: The reference covers exhibits with regard to the account of Cal-Neva Lodge, Inc., appears in the transcript of records, Volume 9, at pages 3602 and 3603 and 3612 and [230] 3613. That is transcript of the record.

No further questions of Mr. Avakian.

Mr. Graves: If that last statement of Mr. Gillen's, in support of the transcript, is intended as part of the proof of the hearing—I realize, of course, the entire record is there, but I think it is incompetent, irrelevant and immaterial. I just do not see that it should be considered. I can not object if it is the record of the case.

The Court: I think all Mr. Gillen was intending to do, in view of the statement the Court made that the Court would look at the record, was to point out the portions of the record Mr. Gillen thought the Court should look at.

Mr. Gillen: That is correct, your Honor.

The Court: Any other evidence?

Mr. Gillen: No, that is the case of the defendant and appellant. Now we do not know what your Honor's thought is.

The Court: I would be glad to hear your views, of both of you, on the subject. Maybe you would like to postpone that until tomorrow morning, or do you prefer to do it this afternoon?

Mr. Graves: The government is ready now.

Mr. Gillen: We have one other thought. We do not know whether this would agree with your Honor—we have one other thought. We would like to have this transcript written up, [231] which wouldn't take too long—two days—and we would like to present a written argument and oral argument and have your Honor have the benefit of the transcript of this proceeding before you, as well as our argument.

The Court: I think the Court would have to

order the transcript written up, whether required in connection with the argument or not, because of the unusual character of the mandate. The Court, I think would have to have the transcript written up and filed as part of these proceedings in connection with such order as might be made in the case, because this is a most unusual proceeding. I have had some research done myself and I have not been able to find a similar kind of remand of the Supreme Court. The issue submitted is a most peculiar one and the Supreme Court does tell the trial court what it should do in the event that it finds certain circumstances to exist, but it does not tell the court what it should do if it does not find those circumstances exist. District judges know more about these things and maybe a district judge could prepare a better order than that. I am not questioning the wisdom of the highest court in the land. There is a hiatus there, so if the Court decides a motion for a new trial should be granted, the Court [232] can order a new trial granted, because that is what the mandate provides for, but if the Court decides to the contrary, I do not know what the Court can do except file a written transcript and findings and decision. I am not attempting to be facetious about the matter, but it is a problem I researched very seriously when I was designated by Judge Denman to sit here. It is a very unusual progeeding, so I think, irrespective of the argument, the transcript has to be written up. I should like to hear more of counsels' ideas while we are all here and the record is fresh in our minds, but I see no objection at all.

after the transcript is filed, to receiving a written memorandum. It might be helpful if I suggest to counsel one or two things that bother me about it. You might know a little more what to discuss. I usually find that lawyers like that. I suggest that is better than to sit with a stoney face and do not tell them anything about it.

Since this is a special mandate of the Supreme Court, it is in order to consider precisely the matter which the Supreme Court asks, the Supreme Court asks the district court to conduct an inquiry and the last paragraph on page 229 of Volume 347, sets forth that the Supreme Court does not know from [233] the record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. It is the obvious meaning of that there was, on motion for new trial, which was in the record, affidavits presented on behalf of the defendant but no counter affidavits of any kind on the part of the government, so the Supreme Court says that it does not know what actually transpired, except as stated in the affidavits accompanying the motion for a new trial. Now the Supreme Court then goes on to say: "The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder", and then there is a further statement that: "The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial

court should not decide and take final action ex parte on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." Now the Supreme [234] Court was acting on the assumption, apparently from the record before it, that sending the FBI agent to investigate the juror was harmful incident. One of the first questions, I think, to be considered is whether or not the investigation was investigation of the juror, whether or not it was investigation of a possible breach of other federal statutes by another person than the juror, and if it was, the question might still remain as to whether or not that might have an impact upon the juror. That, I think, is really the first fundamental question that is involved; and the other question, I think, that is important is the matter of the effect of the procedural steps in this hearing on proof. I mean by that that we now have established the law by the Supreme Court that there is a presumptive prejudice arising from contact of any person with a juror, such as the FBI agent in this case, and that the burden then rests upon the United States to show whether or not that was harmful, in order to overcome that burden. Now what is the state of the record here on that subject? How far does that procedural question affect the merits of this matter? The third matter I would mention is the Supreme Court remanded this case, according to its opinion—I don't know whether

[235] they intend that—was not for the purpose of considering whether or not the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me. However, that is something that comes into consideration.

Mr. Gillen: Doesn't the Supreme Court indicate that it feels that the defendant Remmer should have had the opportunity to have this thing thoroughly explored, the incident thoroughly explored, which would take everything in, Mr. Satterly and——

The Court: (Interceding) The Supreme Court the denial of the application of the defendant to have a hearing on the motion for new trial in connection with these matters was error of the trial court, and that is all of the case, I take it, that was heard. The question is whether or not the circumstances were such that it constituted prejudicial error. In other words, if the hearing would have disclosed that it was not prejudicial, then, even though it was error, it was not prejudicial, then the Supreme Court on that ground obviously would not reverse the decision of the district court.

Mr. Gillen: On that ground. [236]

The Court: On that ground. So, therefore, the Court is hearing this now for the purpose of determining whether or not, if the hearing had been had and these same matters had been disclosed, that would have been a prejudicial error and in reviewing it grant the motion for a new trial upon that

ground. I think those are the matters that seem to me to be matters that counsel should discuss.

(Short recess.) [237]

After recess; 3:15 p.m.

## ARGUMENTS

Mr. Graves: May it please your Honor, counsel for the defendant: At the inception of my argument, on behalf of the government—I know defense counsel join with me—I want to thank your Honor for your patience throughout this hearing. It has been a most unusual matter, but I think everything is before your Honor.

The position the government has taken at this hearing, I think, is quite apparent. We have thrown everything into this hearing except the kitchen sink. If the Supreme Court had considered the fact that a juror is talked to during the course of a trial by an FBI agent, if they considered that that fact alone was prejudicial error, we never would have had this mandate, in my opinion. As your Honor pointed out, the opinion of the Supreme Court in this case—these are the words: "to investigate a juror." Now, naturally, with the record the Supreme Court of the United States had before it—and I was present when the case was argued in Washington—they had nothing with which to help them decide exactly what took place, because, as they pointed out, there was no hearing. That is why we are here.

Now the purpose of this hearing is to present all of the evidence that is available, as to what took

place back in 1951. [238] Now in respect to 1951, two of the three exhibits that have been admitted in evidence, Exhibit C and Exhibit D, are documents that were made in 1951—or Exhibit D was notes of the FBI agent which were made at the time in 1951. The transcription from Judge Foley's secretary's notes was predicated upon notes taken by her on December 20, 1951. The other exhibit which is in evidence, which is defendant's Exhibit F, the statement of Mr. Curnow, was not made until March 23, 1954.

Now I think the important factor in this hearing is for all of us to attempt to find out what did take place in 1951 and in answer to your Honor's observation from the bench, the government's position is that whether or not the Supreme Court mandate said we should have a hearing in respect to the FBI agent contacting a juror, we feel that we should go into the entire matter and present all of our evidence involving Mr. Satterly as well. Now perhaps if counsel had been as efficient as they seem to me in their investigation, they might have asked the name of Mr. Satterly and found it out and perhaps had his affidavit to send to the Supreme Court, but they did not see fit to do this. That is neither here nor there. So as to the scope of the hearing, we take the position we should show everything that happened in 1951.

Now with respect to the procedure which your Honor mentioned from the bench, I think if your Honor should go along and rule with the government—as I personally think you will do [239]

from the evidence as I see it—then I suspect that the suggested procedure of the transcript, plus the findings and your opinion, will go back to the Supreme Court, so they in turn may consider the case on the other points. I think counsel for the defense, as well as counsel for the government, both agree that they have not yet passed on their other objections that the defense has argued to them, and at the hearing I might also point out——

The Court: (Interceding) The whole case was argued to the Supreme Court and certiorari granted generally by the Supreme Court.

Mr. Graves: Correct, your Honor, and at the arguments presented in Washington, when I sat in, which went over two days, most of the time was spent on this particular point, because of questions from the bench, but there was some argument made with respect to other points, as much as possible could be made in the amount of time allowed counsel. I just want to bring that matter before your Honor; so I think your suggested procedure will probably meet with the consent and approval of all counsel involved in this case.

Now the investigation, if your Honor please, seems to be no other than the investigation of the juror. I do not think they understood, and they had no basis to understand, that what took place here was an investigation for alleged violations against the United States of America, namely, jury tampering. [240] and you recall the FBI agent, Callister, who testified here. He said that is what he told Mr. Smith, that he was investigating the case of jury

tampering; not investigating Mr. Smith, and Mr. Bruce Thompson, who was chief assistant United States attorney for the government at that time, testified that that is what he told him to do, to find out if there was a case, to get the facts and see if they had a case for prosecution for jury tampering, not to investigate Mr. Smith, and he said the originating place to get started and find out the name and address of the person was to talk to Mr. Smith, who was the only person talked to by Mr. Satterly. So far as we know, there was no one else. The United States attorney's office at that time was concerned, the attitude of Mr. Thompson, who handled the matter, after he had had a conference with Judge Foley, was that he was investigating an alleged case of jury tampering and he wasn't set out to investigate Mr. Smith or the state of mind of Mr. Smith. All of that, of course, becomes apparent from the testimony that has been adduced here; and I think one of the most important reasons for having the hearing is so your Honor can look at these people, size them up, and see how much weight you will give to their testimony.

Now Mr. Smith and his wife are very solid, sound citizens, lived in this country 31 years, in Reno, and information now shows to us they are conscientious. You will recall Mrs. Smith even clipped articles from the newspaper and did [241] not show them to Mr. Smith until after the trial was over. There was a juror who took the admonition of the Court most seriously and after he mulled this over for one day and a half, he concluded he

should tell Judge Foley about it, and that is what he did, and so we have a note as to what happened in that interview in Judge Foley's chambers.

Your Honor mentioned, during the course of the hearing, the fact that Judge Foley testified. At the time this mandate came down, I personally talked with Judge Foley about the matter, told him I thought it would be nice if he would testify and I thought it was my duty to serve a subpoena and if I did so, would I be in contempt of court. He smiled and said no, and most generously consented to attend, and I believe he was subpoenaed by both sides, and as you recall, Judge Foley testified that after Mr. Smith had made the statement to him, during the recess he thinks—in any event it did not take long—then he called Miss Cooper in and asked Mr. Smith to repeat, dictate it to her. She took it down and what she got out of it was this—this is December 20, 1951, two days after the alleged incident:

"Thursday, December 20, 1951, Carson City, Nevada, 11:05 a.m. in Judge Roger T. Foley's Chambers.

"Juror Smith:

"Sold a house to a party (Jim Slatterly) * * *" Her name spelling is wrong: "* * * years ago. Carried [242] their insurance with him. Came over to his house. Had a wreck with his car. When he came in he said, 'I know Bones Remmer; you are a member of the jury; why don't you make a deal with him?' Reminded him that he wasn't to talk about the case. The man shut up."

That was the sum and substance of the conversation that was held between Mr. Smith and Judge Foley. So Judge Foley then did the normal thing, he called in the assistant United States attorney to see what should be done about investigating, and I believe Judge Foley sincerely intended if there was a case of jury tampering going on, it was going to be investigated and the government should prosecute and I think that was also the attempt made by the United States attorney's office. Now Judge Foley told up that his impression, after this conversation with Mr. Smith, was it was a jest.

Let's look at the other side of the picture and look at what the defense could have done a long time ago if they desired.

Mr. Gillen: I direct counsel's attention to the fact that we never learned the name of the man, it was never brought out in court about the investigation of this thing. Here is a nation-wide federal force of investigators. They didn't follow this man into Washington or Idaho or Oregon to interview him. I don't think counsel should mislead the Court. [243]

Mr. Graves: It is the testimony of counsel for the defense they talked to Mr. Smith and didn't ask this $64 question. I still say they could have found it out.

Getting back to the crux of my argument, I sincerely believe that is what Judge Foley had in mind, to check on jury tampering and not investigate the juror.

Getting back to Mr. and Mrs. Satterly, before I

was interrupted by counsel, we observed them on the stand, the type of people they are, and you heard Mrs. Satterly, who obviously is a woman of firm conviction, state that Mr. Satterly is always joking. Mr. Smith's reaction to it was he was always joking, and I say and believe that where jurors are not locked up during the course of a trial, that you are bound to have people come around and say, "You are on the jury", make some kidding remark. These were people who, apparently as they do in Nevada, enjoyed hunting and outdoor life, so much as that Mr. Smith was willing to postpone his trip to go hunting with the Smiths, if Mr. Smith could get away. Now in the first place, my impression of the Satterlys—it is the first time I had ever seen them also—I don't thing he is the type of fellow that the defense, if they were to consider to approach a juror,—certainly they would not consider such a thing—he is not the type of man he would use. I think he is too simple, but the fact remains, I think that he was joking and he said it in jest. What he said that they placed so much importance upon, about the alleged sale of [244] Cal-Neva Lodge for so much—850 thousand dollars over the table and 350 thousand dollars below the table and 300 thousand he didn't dare bring to light, to me that is just idle gossip. I do not think there was any foundation for the remark and I think if that is the fact, what he said, I am satisfied it didn't mean a thing and didn't mean a thing to Mr. Smith.

Let us bear in mind the rulings in the Higgins

and Stone cases, which I cited, and your Honor permitted me to ask the direct question of this juror, my last question to Mr. Smith: "Were you prejudiced by this contact", and his answer was no, an unequivocal no, which in this case he has a right to make that answer to defend his verdict, which he did.

Now the defense placed great moment on the so-called conversation between juror Smith and Mrs. Helen Mack. Now, your Honor had an opportunity to see at very close range how Mrs. Mack's attitude is. Now, bear in mind in December of 1953 Mrs. Mack had lost her husband; she was still upset by this case here, but going back to 1951, they had been deliberating for two and a half days, the case had taken from November 28th to February 25th before it got through, and I submit everyone of the jurors had been under strain, under pressure. Now if Mr. Smith said that, so what. It was the normal thing. Mr. Tinkham claims it was he who said it. I don't believe that has any relation whatsoever that counsel would have us believe it did, and I think Mrs. Mack, being a female (with apologies to Mrs. [245] McIntyre) when she saw this article in the newspaper, she immediately arrived at the conclusion that that was what he was talking about, when I think he merely was expressing the fact, if he did say it, but he does not recall and does not remember any such statement, that he was tired.

Your Honor, in this case the government has produced twenty-six witnesses and we have no other

witnesses; we have nothing to hide in this matter. We produced every single witness we could here, the whole jury, including the two alternate, [illegible] all government counsel who participated in the trial, all the people who were in Mr. Smith's home, Mr. and Mrs. Satterly and Mrs. Smith, the deputy marshal, the agents of the FBI—we have nothing else to give you, and I fail to see, with all of the testimony we have, your Honor, how you could avoid reaching the conclusion that the contact of this juror by the FBI agent was for the sole purpose of investigating a possible crime that might have taken place of jury tampering, and nothing else, and those were the instructions the FBI agent received, those were the instructions the United States attorney received from Judge Foley himself, that and nothing else. Why did the Supreme Court say—"to investigate a juror"? It was because they did not know, but they will know when this transcript comes before them.

I think the government has more than sustained the burden and I think we have sustained the burden of proof, which we [246] admit we have to because of this type of hearing. Most of the jurors, if your Honor please, and the alternates, are powerless. They have nothing to say. Mr. Smith never talked to them at any time. We have the statement of Mr. Curnow dated March 23, 1954, but the statement he made in 1954, your Honor, does not make sense when you know the type of man the deputy United States marshal is—here for nine years. He said he couldn't talk to the jury at any time about

a case, and I think he meant exactly that, and even if he had said it, which I do not believe he did, I do not believe it would have made any difference at all.

In this case we have a juror who was most conscientious. Most of the jurors wouldn't report that sort of contact to the Court because they don't think it has any bearing on it, and in this case Mr. Smith has testified, and he told the FBI agent, and it is in the statement and the notes, that this had no effect upon him whatsoever, that he wiped it from his mind, he considered it a joke, and he told Judge Foley, and that is exactly what he did.

I don't think there is any importance to Mr. Curnow's testimony. I don't think it matters. Something may have suggested it between the time he was juror and the statement was made.

So, your Honor, I think that we have sustained the burden of proof in showing what the contact was, the effect of the contact on the juror of Mr. Satterly which, of course, for the [247] purpose of this hearing we are going into; but getting back to what the Supreme Court said of the FBI agent, I think we have clearly demonstrated why that was made. I am satisfied there can be no other conclusion than that it had no effect upon Mr. Smith. I am also satisfied we have established, beyond a doubt, that Mr. Smith in no way communicated anything to any of the other jurors. As a matter of fact, your Honor, in the Rakes case, we had a case similar to this one, 74 Fed. Supp., also in the memorandum cited by counsel. In that case there

was a similar contact made, except there was a bribe offered. There was no bribe offered here. I do not think there was even a reference to a bribe. I think it was idle chatter. Mr. Sattefly of course, after all these years, does not remember what happened. Neither does his wife and Mrs. Smith did not hear it and, your Honor, when the juror came in and talked to Judge Foley, they decided the matter was a joke and the judge told him to forget it. In this case Judge Foley testified he admonished Mr. Smith to say nothing and Mr. Smith followed the admonition, as he followed all the other admonitions.

So I can say, your Honor, in closing now, if they are trying to build up an appeal by alleged conversation that took place, I don't see how they can do it when they have, from the juror's mouth himself, it had no effect upon him whatsoever and he did not talk about it to anybody else. I don't blame them, they have to grasp at any straw, it is their duty, but we have [248] everything we have and I do not see how any reasonable man could differ from the conclusions and opinions I have just pointed out to your Honor. Thank you, your Honor.

The Court: Mr. Graves, assuming the Court agrees that the investigation was for the purpose of determining whether there was jury tampering or any obstruction of the justice statutes and that it was not, as inferred by the Supreme Court, for the purpose of investigating a juror, would there be any inference that would be harmful, the fact

that the juror was interrogated by an FBI agent, that even though the investigation was for the purpose of determining whether or not there had been a violation of the federal statute by a third party, that investigation of the juror, being an interview with a juror, would be subject to the same rule of law as if the juror were being investigated?

Mr. Graves: I do not think so, your Honor, because if that were the law, I do not think we would be here, and there is no question that is what happened. If that was the law, I do not believe the Supreme Court would have caused a hearing.

The Court: You mean if it appeared to the Supreme Court there had been an affidavit on the part of the government, or some showing that the investigation the Supreme Court referred to was an investigation of a third person, rather than investigation of the [249] juror, that the Supreme Court would not have remanded the case for investigation, is that what you mean?

Mr. Graves: I am inclined to think so. I think the Supreme Court, in its wisdom, felt a complete hearing should be held to find and ascertain the exact circumstances. I do not think the mere fact, and I do not think the Supreme Court thinks the mere fact, the FBI agent, or anybody else, talks to a juror, that that alone, the mere fact of talking, is prejudicial error. I think you would have to show, as your Honor points out, that there was prejudice here. What better source do we have than the juror who was talked to and who, himself, deliberated?

The Court: Of course, the FBI, I suppose, could well have a talk with a juror in a pending case, if he wanted to get information concerning some other things entirely disconnected with the case. For example, say the mere fact that an agent of the government, investigating happenings against the laws of the United States, could see a juror, I do not think, a juror would be immune from inquiry and I do not think that would be a basis for alleging any influencing in the verdict of the jury, because a juror would have, as a citizen, to give information, whether he was a juror or not in a case, but the only problem that remains is whether or not [250] the fact that the inquiry was made by the FBI agent of the juror in the matter, that involves the alleged possible commission of an offense by a third party who has no connection with the case himself, whether or not any presumption of prejudice is involved. In other words, what I am trying to get your view on, which is really the only point at this stage of the matter that bothers me at all, is whether or not the presumption referred to by the Supreme Court applies in a case where an agent of the FBI talked with a juror is not with respect to investigating the juror, but with respect to investigating offense of some other person, who would have no connection with the trial of the case, whether the presumption extends that far.

Mr. Graves: I will answer this way, your Honor, I think, in all fairness to the defense, that the Supreme Court took the view that such a presumption does attach, and that is why they ordered a hear-

ing, to see whether that presumption could be overcome, which I think was done.

Now in another case cited your Honor, the Higgins case, when this woman offered a bribe to one of the jurors, she was convicted and the juror was still permitted to testify that that did not prejudice the verdict of that juror. We have seen other cases with respect to a contact with a juror and when they can [251] prove by their evidence there was no prejudice—and there has to be corroboration in addition to the bald statement of the juror himself, but I think we have shown there was no prejudice, your Honor.

The Court: Then I think what you are really saying is that there is a presumption in the case of any contact with a juror and the burden is upon the government to furnish proof to show that the contact was harmless. That would simplify the question very much.

Wednesday, June 9, 1954, 9:45 a.m.

Present: Messrs. Gillen, Avakian and Lohse, attorneys for the defendant.

Messrs. Graves and Rittenhouse, attorneys for the plaintiff.

Mr. Gillen: May I apologize for the absence of our client, Mr. Remmer. I believe he may have, through inadvertence, misunderstood court was at 9:30 this morning. I phoned the motel where he was staying to see if he had left his quarters. At all events, any irregularity that could be seized upon

because of his absence is waived, for the record, by his counsel. Now, with the Court's permission, I will proceed as expeditiously as possible. [251-A]

May it please the Court and counsel: On behalf of the defendant and appellant, Elmer Remmer, it is our understanding that we are going to be given an opportunity, when the transcript of this hearing has been written, to submit some authorities to your Honor, after examination into the law, primarily because, as your Honor has recognized, and as we certainly recognize, this is an unusual proceeding and we believe, from every standpoint, and purely academic reasons, we should examine the law, so—(may the record show Mr. Remmer, the defendant and appellant, has arrived)—my remarks this morning, may it please the Court, will be first by way of fact answering the matters that your Honor has raised in yesterday's session, the matters that concern the defendant. I will state what is our legal position, and then, with the Court's permission, I will review, to some extent, some observations of my own on the testimony that went before your Honor. I am sure that your Honor is alert to the particular matters that appeal to us, as defense counsel, but I feel it is better we should comment on these things.

Now, may it please the Court, our position is that the purpose of this remand is to give us the hearing that the law entitles us to and that we asked for in our motion for a new trial. We believe that that hearing should cover all of the circumstances relating to any contact from any outside source

with any juror, and every other thing or matter which [252] may have grown out of such a contact. We believe that the extraneous contacts in those incidents, as revealed by this hearing, are the following—that there was an extraneous contact between a Mr. Satterly and Mr. I. J. Smith, who later became foreman of the jury; then there was another extraneous contact between Mr. Smith and Judge Foley and Miss Cooper, or with Judge Foley, and then Judge Foley and Miss Cooper, which set in motion by Mr. Smith, and set in motion with commendable motives in mind on the part of Mr. Smith, but nevertheless an outgrowth of the original contact with Mr. Smith by Mr. Satterly, and then thereafter another extraneous contact between Mr. Smith and Mr. Callister, the agent for the Federal Bureau of Investigation, and finally, as an outgrowth, a contact between Mr. Curnow, another juror, and the deputy United States marshal, Mr. Hubert Boyd.

Now the law of the case, as we see it, as set down in the decision and found on page 451, very briefly is as follows, may it please the Court. The Supreme Court of the United States, in the case of Remmer vs. United States, 74 S. Ct., page 450, at 451, said:

"In a criminal case any private communication, contact, or tampering, directly or indirectly, with a juror during trial about the matter pending before the jury is presumptively prejudicial, if not made in pursuance of known [253] rules of court and instructions and directions of the court made during

trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."

Now we say, your Honor, that the question which confronts your Honor, the trier of the facts in this hearing, is to determine whether or not the contacts that are mentioned here served to produce an impact upon the one or more jurors, which in any wise affected their efficiency and the performance of their duties as jurors, and thereby infringing upon the rights of the defendant Remmer, not only, may it please the Court, whether it did, but whether it might have. Now when I mention jurors, I mention particularly Mr. Smith and Mr. Curnow, to whom we know there were contacts made, from the evidence produced by the government's side. So the Court is called upon to determine whether or not the evidence in the case shows that these extraneous contacts are affirmatively proved to have been of such a nature that they not only might have affected the jury, but they actually factually did not affect the jury; in other words, that they were harmless.

Now in the Little case, may it please the Court, on page 866, in the case of Little vs. United States, 73 Fed. Reporter (2), at page 866, and I am reading from page 866 and [254] *and* a portion of 867, and that is found, may it please the Court, in the memorandum I gave to your Honor, it is said:

"But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. So to hold would, as a practical matter, take from a defendant his right to a fair trial. In this case we know nothing of what went on while the stenographer was in the jury room * * *"

That was a case where the stenographer was permitted to come in and read the record and the Court held it raised the presumption and not affirmatively overcome, because the defendant and his counsel were not present and defendant's counsel was not there to even to object; in the event that he felt that the tones or inflections of the voice being used by the reporter reading the instruction the Court had previously given in open court might have affected the efficiency of the jury, to the detriment of the defendant.

Now the position that we have taken, our legal position, I believe has been conceded by the government counsel; that is, to the extent that presumption applies to any contact that was made; any extraneous contact, that was made with any juror, because any extraneous contact might have been prejudicial, and [255] concession being made, the government, of course, readily proceeded to attempt to prove to your Honor, by testimony and evidence in this case, that those extraneous contacts were in fact harmless.

Now Mr. Graves said, to use his own language,

that in meeting the burden that he had put before your Honor everything but the kitchen stove. He had allowed everything to go in the record except the kitchen stove.

Mr. Graves: Sink.

Mr. Gillen: Well, of course, Mr. Graves may have felt he was being magnanimous in the proceeding; in fact, Mr. Graves may have felt he was being magnanimous when he said if the defense had wanted to make a contact, he believed we would have selected a much more competent man. For the compliment we thank Mr. Graves. But in all events, Mr. Graves' production of all of the witnesses here was for the purpose of presenting to your Honor that each witness would say, "Mr. Smith, during the course of the deliberations, did not tell us about this incident that had occurred to him and his reporting to the judge." Two of the witnesses, fellow jurors, said after the case was over and the entire matter came to light in the public press, in one instance Mr. Smith had mentioned this on the way home from returning the verdict, and the other instance some two weeks later after the matter had been in the public press. [256]

Now also to meet the problem to show that this extraneous contact of Mr. Smith was harmless, the contention was set forth that Mr. Smith concluded that this was a joke. Of course, the testimony is a little hazy on who it was that first decided that this was a joke, it was a facetious remark and it was not based on any ulterior motive or meant to be taken seriously. Mr. Smith, in his testimony, says

it was Judge Foley who suggested to him that this was a joke and should be regarded by him as such. That is a little bit difficult for me to believe, because Judge Foley did not know the man involved, Mr. Satterly. I do not think Judge Foley would have jumped at the conclusion Mr. Satterly was being facetious when he didn't even know him. On the other hand, Judge Foley testified that it was his recollection it was Mr. Smith who told him, knowing the man, he thought it probably was a joke, but he felt it was his duty to report the matter, because of Judge Foley's continued admonitions. At all events, we of the defense feel, and we contend before your Honor, that the testimony produced by the government shows that Mr. Smith did not feel that this was a joke, and if I may have your Honor's indulgence for a minute to point out the particular reasons why we feel that this was not a joke in the mind of Mr. Smith at the time it occurred, or at any time thereafter.

Now, first of all, we have the testimony of Mrs. Irving J. Smith, who was present in the room, who was talking to Mrs. [257] Satterly, within hearing of her husband and Mr. Satterly. Mrs. Smith said that her attention was directed by the fact that her husband had raised his voice, and in raising his voice had said something about the fact that he was not permitted to discuss the Remmer case. Now Mrs. Smith was very keenly conscientious, may it please the Court, because she said she had saved all the newspaper items, but had not shown them to her husband until the conclusion of the trial. Now she

was attracted by this, she heard him raise his voice and she heard what he had to say.

Number two, the answer that Mr. Smith gave to Mr. Satterly was not the answer that one friend, or one business associate, gives to a client when he recognizes the client is cracking a joke, if I may use the term, or bantering, or in the vernacular of the American tongue, wisecracking, if the remark was made by a business client to Mr. Smith, whom Mr. Smith knew was given to being jovial and cracking jokes and bantering and kidding, as the terms are, Mr. Smith would not have raised his voice, would not have been so constrained and would not have given such a severe retort to Mr. Satterly, such as "You know I am on the jury. I can't discuss this matter with you. I can't discuss the case." Now your Honor knows that people who are given to bantering and repartee do not become severe, one with the other, particularly if they know each other, and particularly if there is a business relationship. [258] Your Honor mentioned the other day that you had practiced for thirty years. I have practiced law now for twenty-six years. I know if I have a client, whose business I like to retain and the client is given to cracking jokes, I try, in my feeble way, to retort and reply in part and to let the bantering go on. I don't take it to task, I don't raise my voice, I am not severe, because if I know he is joking, the occasion does not call for that. By the way of illustration, suppose a friend says to me, "I am going to rob the First National Bank, will you come and join me" and I

say, "Wait a minute until I get my tools". I don't say to him, if I know he is joking, "Why do you suggest such a thing to me. You know I am an honest man; you know I wouldn't participate in robbing the First National Bank with you." That would be a rather ridiculous situation. So I say to your Honor that Mr. Smith can hardly tell us now that on that occasion—it is hard for us to concede—that he thought on that occasion that this man was joking, when he raised his voice to retort severely and the very answer he gave is not an answer back in kidding with a client.

Now what else happened? He told us that he worried about this matter for two days. He said he mulled it over in his mind. He wanted some advice on it. He was afraid to discuss the matter with his wife because he felt that was improper, in keeping with his recollection of the admonitions given [259] to him by the United States District judge, who was presiding in the case. He did not feel he could even talk it over with his lawyer, but it bothered him for two days and he concluded, as he told us on the witness stand, that the only person in the world he felt he could seek advice from was the United States judge presiding at the trial, who told him, as he told all the jurors, "If you are approached, make it known you are a member of the jury and if the person persists, report the matter to me." So he reported the matter to the judge. Now we do not criticize Mr. Smith for reporting the matter to the judge. Mr. Smith was trying to be a conscientious juror. I feel also Mr. Smith did

not know just exactly how to handle the situation. I feel he felt just as developed here in this hearing, that Mr. Satterly was an opportunist and that Mr. Satterly saw the possibility, because of his acquaintanceship and business relationship with Mr. Smith, because of Mr. Smith's position on the jury, that here might be a potential deal, which would benefit not only Mr. Smith, but which might benefit Mr. Satterly and which might benefit Mr. Remmer, whom Mr. Satterly, although he represented otherwise to Mr. Smith, only knew by sight. So Mr. Satterly propositioned Mr. Smith and Mr. Smith felt that that was what was done, that he was being propositioned or felt out, and if he was amenable to this suggestion, then Mr. Satterly would go about doing the best he could to be a go-between agent and fuse the deal together. So [260] Mr. Smith reported the matter to Judge Foley. Now we do know this—we don't know how he reported the incident to Judge Foley, we don't know who it was suggested, of course, that this sounded like a joke, but I am inclined to believe if anybody suggested it first, it must have been Mr. Smith, because, as I say, Judge Foley would not jump at the conclusion the man was joking, when he didn't even know the man. All right. Strangely enough—I can not explain to your Honor why—Mr. Smith did not go into the detail with Judge Foley that he went into with the Federal Bureau of Investigation special agent, Mr. Callister, at a later date, a few days later. I do not know whether it was because Mr. Smith was just putting himself on record about this

thing and felt just telling the judge would be enough to put himself on record, in the event anybody had made this contact with him, that he could point to the fact that he had told the federal judge presiding such a thing had occurred.

Now a few days later it was brought strongly to the attention of Mr. Smith that it was serious, because here at his office appeared a G man, who says to him, "I have been directed by the United States judge to make an investigation of this incident." Now Mr. Smith says that this is not serious, just a matter of telling the federal judge and putting himself on record, clearing his skirts, but here is a G man. As your Honor knows, all over the United States and all over the world, [261] the Federal Bureau of Investigation is known and they are viewed both with respect and with awe, and so Mr. Smith sees now that this thing has taken a turn, is serious. There is an investigation being made. Now it is true that the contention is made that the representation was made to Mr. Smith, "I am investigating Mr. Satterly", but let us not be deluded, because we know, and Mr. Smith knows, that whether the FBI man said he was investigating Mr. Satterly or not, that Mr. Smith was right in the center of the whirl about a matter, an incident that the Federal judge told the Federal Bureau of Investigation to investigate. Now, we say for that reason Mr. Smith can not state that it was a joke and, indeed, his conduct shows he did not believe it was a joke, because what he do? He elaborated a great deal more to Mr. Callister than he

hast to the judge. He told Mr. Callister—if I may just take your Honor's time on that—he told Mr. Callister, and Mr. Callister put down in quotation marks, which he said was indicative, in his personal notes, of the fact that he was relating haec verba the statement of a person he was interviewing: He put in quotes that Mr. Smith reported to him that Mr. Satterly had said, as follows: "I know Bones Remmer very well. He sold Cal-Neva Club for $850,000 on top of the table but he got 350 thousand dollars under the table and has about 300 thousand dollars that he daresn't touch." Now he didn't tell that to Judge Foley, but he told it to Mr. Callister, the Federal [262] Bureau of Investigation special agent, and that was a very significant and important thing. That was something that presumably Mr. Satterly, if he was feeling out Mr. Smith, was giving him by way of baiting him or influencing Mr. Smith. He was showing Mr. Smith how much money he knew that was available to the reach and touch of Mr. Remmer, big money, and your Honor will recall Mr. Smith's testimony was to the effect he couldn't recall exactly whether the word "money" was used, but the impression conveyed to him was that he was evidently able to make such a proposal.

Now Mr. Callister took this data from Mr. Smith and went on his way and Mr. Smith continued as a juror in the Remmer case, and as Mr. Smith continued as a juror in the Remmer case, lo and behold Mr. Smith discovered that the government was presenting evidence about what? About Mr.

Rennner's ownership, conduct, business connections, with draw-accounts, with money received from a final sale of Cal-Neva Lodge, a very important factor in the case and, of course, we must assume what—that Mr. Smith's memory harkened back to this very quotation he gave Mr. Callister. Here is the very thing Mr. Satterly was talking about, the very thing Mr. Satterly was talking about, here is the very transaction Mr. Satterly said was partially done under the table for a large amount of money.

Now Mr. Smith, may it please the Court, heard no more [263] from the government. He was interviewed by Mr. Callister. He did not know from that day forward, until the end of the case and until long after the case was over, whether Mr. Callister was still investigating, whether Mr. Callister was still taking directions about the incident from the federal judge who was trying the case, under what scrutiny Mr. Smith himself was throughout that period of time. No one, may it please the Court, took the trouble to tell Mr. Smith, "This investigation has been completed, Mr. Smith, and the United States government, the judge presiding, the United States attorney, the Federal Bureau of Investigation are all satisfied it was a harmless proposition." Nobody took the trouble to tell him that. As a matter of fact, may it please the Court, the testimony of Mr. Bruce Thompson clearly shows that the United States government itself, that the United States District attorney of this district himself, or his office, had not concluded the investigation and

determined what they were going to do about it until after the Remmer case was over, because your Honor will recall Mr. Thompson said he received a final written report in March of 1952 and it was then determined to do no more about the matter.

Now, another thing that strikes me as significant. Although the contention is made now that Mr. Satterly was being investigated, strangely enough Mr. Satterly is the only man who was not contacted. Mr. Satterly was the only man that they [264] did not go to and say: "Look, Mr. Smith said you talked to him. What did you say to him or did he say to you? Were you joking or were you feeling him out? Do you know Mr. Remmer? Do you know that he is open to a proposition of this kind? Did he get 350 thousand dollars under the table and has he 300 thousand dollars he daresn't bring to light, but he could use in a transaction such as you seemed to indicate and proposed to Mr. Smith? How about those things, Mr. Satterly? Can you tell us?" Mr. Satterly was not contacted until long after the matter was closed.

Now since the investigation of Mr. Satterly and Mr. Smith was never closed or concluded until long after the Remmer case ended, long after the verdict, which found Mr. Remmer, with respect to some of the counts in the indictment, guilty and which disagreed as to other counts in the indictment, the thought crosses our minds, we of the defense, what would have happened if there had been a complete acquittal of Mr. Remmer? What would have happened regarding Mr. Irving J. Smith, the

juror, and Mr. James Satterly, the man who saw Mr. Smith at his home and made these comments to him during the early part of the trial? Would Mr. Bruce Thompson have received a report in writing from the Federal Bureau of Investigation and said, "Close it out", or would he have done something else about it? We do not know to this day, and certainly Mr. Smith did not know throughout the period of time he was serving on the Remmer [265] jury.

Now, may it please the Court, we say that Mr. Smith couldn't have thought it was a joke. The very night, February 22, 1952, when the jurors had concluded the performance of their duty, they had returned the verdict, finding him guilty on some counts, they had announced their inability to agree as to other counts of the indictment, they had been discharged and the Court expressed appreciation for their services, they were on their way home, and Mr. Smith mentions to his friend, Mr. Tinkham, his fellow juror, with whom, for a period of three months he was practically living and riding back and forth in their respective automobiles, under friendly arrangements, said to him, as Mr. Tinkham testified: "I am not sure whether I was approached or not, but a man talked to me about the situation and I reported it to Judge Foley. I am not sure." On the night of February 22nd, and after the jury returned its verdict, "I am not sure," he said to his friend, "whether I was approached or not and I reported it to Judge Foley." He didn't say to Mr. Tinkham, "I have the darnest business

client and he said something to me in a joke and I laughed myself silly." He said, "I am not sure whether I was approached or not and I reported it to Judge Foley."

Now a little later that same night he said to Mrs. Mack—and incidentally, may it please the Court, I do not know whether you were in a position to note or not, but certainly [266] Mr. Graves knows, he is present in Nevada and has come to acquire knowledge by reason of spending considerable time in Nevada—Mrs. Mack is not, as Mr. Graves said yesterday, with apologies to Mrs. McIntyre, just a woman. Mrs. Mack is not just a woman; Mrs. Mack has held executive positions, has held office, and I think anybody in Nevada will tell you is a resident of half a century in Nevada, is an able civic leader, and it is my information that only recently she was approached by several groups to present herself as a candidate as Secretary of the State of Nevada. Mrs. Mack is no shallow-minded, simple-minded woman. Mrs. Mack is a very able, earnest woman, very civic minded, and Mrs. Mack related here that shortly after they parted company with Mr. Tinkham, after this intervening disturbance of the fire at his residence, she got into Mr. Smith's automobile and she was driven to her home by Mr. Smith, that in front of her home Mr. Smith told her, indicating it was still on his mind and still disturbing him, he said, "Thank you, Mrs. Mack, for the assistance you gave me. I was under pressure. Some day I will tell you why I was so interested"—in the Remmer case, of course—and may it please the

Court, your Honor will recall that even on cross-examination, although he repeatedly talked about the tendencies and temperament of Mr. Satterly, to crack jokes, even on the witness stand before your Honor, he had to admit that he was not definitely certain in his mind that this was not a serious proposal. [267] based upon an ulterior motive in the mind of Mr. Satterly.

Now more than that, in December of 1953 Mr. Smith told Mr. Avakian, who approached him on the basis that Mr. Avakian revealed, that we had to be in a position to establish before the Supreme Court that such an incident did occur, and that he sought an affidavit to that effect from Mr. Smith, and Mr. Smith admitted to Mr. Avakian that he felt that this was something that was a mere brain-child of Mr. Satterly's and Mr. Satterly was feeling him out to see whether he was amenable to such a proposition. Now even before that December, 1953, some two weeks after the verdict was returned, on February 22, 1952, his friend, the alternate juror, Mr. Morris, who rode back and forth but did not happen to be riding from Reno to Carson City the night the verdict was returned, being discharged as a juror, his friend seen the newspaper report and inquired of Mr. Smith, and Mr. Smith told him he thought Mr. Satterly was feeling him out, but Mr. Smith said he eventually determined that it was a joke.

Now another thing of significance to us, may it please the Court—I am not assuming or branding anybody a liar—but another thing significant to in-

dicate to us this was not a joke, that there was some ulterior motive about the whole thing, Mr. Satterly denies, he, Mr. Satterly, denies it ever took place, and then Mr. Satterly, having sat in the courtroom and heard the testimony, said it was a joke, said "If I did say such a [268] thing it was a joke; I wouldn't have remembered it."

Now Mrs. Smith, her testimony is rather reconcilable of what we know of the normal tendencies of women's views. Mrs. Smith said that early in the trial, she being aware of how conscientious was her husband and how strictly he adhered to his duties as a juror in the Remmer case, she was attracted by her husband raising his voice and admonishing a friend, a business client, in the living room of her home, that he must not discuss the Remmer case; that even though she clipped all the newspaper clippings she kept them away from her husband, but prepared a scrap book that she could show him at the conclusion of the case to read; even after the public press came out and used the name of Mr. Smith and contact and everything about the Satterly incident, without, of course, mentioning the name of Satterly but mentioning the name of Smith, Mrs. Smith said that she never, that she can recall, talked to her husband about it. Her husband, Mr. Smith, when he was mulling this thing over in his mind for two days before reporting it, wanted to discuss it with his wife, but felt that he could not. She said she does not recall that they ever discussed it.

Now out of the Smith incident, and when it be-

came apparent, in the light of the law, that this matter should be probed into, counsel for the defense, as has been developed here, your Honor, sought out various jurors, in an effort to determine whether or not the Smith incident had come to their [269] attention, and if it had come to their attention whether or not it had created any feeling of significance in their mind that might have affected their verdict, and in the course of interviewing the jurors Mr. Richard Curnow was encountered by your humble servant, and discussion was had about the proposition of an affidavit. Now Mr. Curnow related a situation which has been denied, and your Honor is going to be called upon to determine, did this incident involving Mr. Curnow and the deputy marshal, Mr. Boyd take place, or did it not take place. Mr. Curnow was first approached by the defense on the inquiry, "Did the matter of Mr. Smith's extraneous contact with some one, and his report to the federal judge come in your attention?" and Mr. Curnow ~~brought to light~~ another matter. "No", he said, "I did not know anything about Mr. Smith until long after. Something did come to my attention and it happened along about the middle of the trial, but I thought it was about another juror, to-wit, a Mrs. Mack, whom I knew had gone into the judge's chambers." Now did it happen or didn't it happen, this incident about Mr. Curnow having a talk or being questioned by the deputy United States marshal, Mr. Boyd? We feel that the reasons why it did happen are these, may it please the Court. It developed at this hearing

that the incident was voluntarily brought to light by Mr. Curnow. It was volunteered, brought to light, when Mr. Curnow, admittedly friendly with Mr. Boyd, thought that he was relating something to indicate diligence [270] and the performance of his duty by Mr. Boyd. Mr. Curnow obviously did not know anything about this regulation, this prohibition, in the marshal's manual, which Mr. Boyd made reference to in his testimony yesterday.

Now No. 3, why, why any human, why should Mr. Curnow conjure up such a story, make up such a story? I can think of no reason. Again, why would Mr. Curnow tell the story to Mr. Gillen, attorney for the defendant and appellant, and later to Mr. Avakian, another attorney for the defendant and appellant, both of whom he refused to either sign an affidavit for or a statement for. He told us about it, but he wouldn't sign an affidavit for me and he wouldn't sign the other statement for Avakian. Why should he tell us this story, when he wasn't in sympathy enough with our inquiries, or our efforts, to sign a statement? Now why would Mr. Curnow tell the same story, practically, at least insofar as the incident of the conversation is concerned, not all the details of the situation, to the special agent from the Federal Bureau of Investigation, Mr. McGee, for whom he was willing to sign a statement, for whom he was willing to sign a statement and then, may it please the Court, then, may it please the Court, even though he attempted to curtail his testimony somewhat by denying that conversation had any reference to any jury being

solicited to take a bribe, or anything of that sort, he said upon the witness stand that he thought that Mr. Boyd was merely being curious when he asked [271] him, "Did anybody talk to you or did you hear of any other juror being talked to", and made no mention that there had been a juror talked to, and that that was why he was questioning Mr. Curnow. That is belied by the fact that Mr. Curnow made a statement on March 23, 1954 to Mr. McGee of the Federal Bureau of Investigation, and in that statement he said:

"As a matter of fact, I had noted that Mrs. Mack had gone into the Judge's chambers, and I thought at the time that Boyd's remark might therefore concern her; however I later learned that she had been mentioning an illness problem to the judge." Now, may it please the court, certainly, certainly something was said about some approach to some juror; otherwise it wouldn't have come into Mr. Curnow's mind: "I saw Mrs. Mack go into the judge's chambers and thought she must be the juror that is involved in this approach." Now we say, may it please the Court, that Mr. Curnow's experience sprang initially, the extraneous contact, from Mr. Satterly's contact with Mr. Smith and Mr. Smith's subsequent action and report of the matter and in the final investigation being set in motion. Now the Smith and Curnow, both incidents, sprang, as we say from the initial extraneous contact.

Now we come to something else. If the United States marshal, or rather the deputy United States marshal, Mr. Boyd, knew that a juror had been ap-

proached and whatever might have [272] been his language—a juror had been approached, or somebody had attempted to influence a juror or attempted to give a bribe to a juror—if the United States marshal knew about that early in the trial, where did he get the information? The information was confided by Mr. Smith to Judge Foley, was confided by Judge Foley to the deputy United States attorney, Mr. Thompson, Mr. Thompson called in the Federal Bureau of Investigation agent, and then Mr. Thompson told the prosecution counsel. Where did the information leak out to the deputy United States marshal? How did he know, and how did Mr. Ernest Lenn of the San Francisco Examiner, while the jury was out deliberating, how did he know about the incident and therefore be in a position to ask Mr. Thompson: "What about this? What about this contact with this juror?" and how, on Sunday morning, the jury having returned its verdict on a Friday night late, how on Sunday morning did the public press have accounts of the incident and the name of Mr. Smith and the fact that Mr. Smith, early in the trial, had reported the incident to Judge Foley, and the fact that the Federal Bureau of Investigation was investigating the incident? Everybody, may it please the Court, who admits any knowledge about the incident, has denied they gave out the information and made it public.

Now where did it come from? It certainly did not come from Mr. Satterly, because Mr. Satterly testified here, under oath, it never happened.

Whether such a thing did happen, he [273] had long since forgotten about it and he was never contacted until a month of six weeks ago; and it certainly didn't come from the defense, because we never did know about it until it came out in the public press, or until the public press reporters came and asked us about the matter and asked what would have been our position if we had known, and, of course, we said we would have asked for a mistrial or the juror replaced by one of the two alternates, who were available throughout the trial. Now somehow it got out.

Mr. Graves said to your Honor: "I threw in everything but the kitchen stove"—sink, I beg your pardon—but it developed, may it please the Court, yesterday, that even they had the signed statement of Mr. Curnow made to Mr. McGee on March 23rd; it was not until after Mr. Curnow was placed under cross-examination yesterday and these matters and this signed statement brought to your Honor's attention, that Mr. Boyd was interviewed in the back of the courtroom by the deputy United States attorney and finally called yesterday afternoon to tell his recollection what he knew of the incident which Mr. Curnow reported. Mr. Curnow reported to two defense lawyers, for whom he was unwilling to sign a statement, and Mr. Curnow finally reported to the FBI special agent, for whom he was willing to cooperate and for whom he did sign a statement of what happened in this contact and conversation between him and Mr. Boyd.

Now, may it please the Court, on the govern-

ment's proposition [274] of Mr. Smith's testimony and Mr. Smith sitting in judgment of his own mental reactions of these things, your Honor will recall that we objected to Mr. Smith being allowed to testify that this incident, and any subsequent matters pertaining thereto, had in no wise created prejudice in his mind that might have effected substantially his verdict in the Remmer case, on whose trial he sat as foreman of the jury and returned his verdict. We cited to your Honor a number of authorities, setting down the major rule that a juror can not impeach or support his own verdict by any subsequent extraneous proceedings, as to what his verdict was or prompted it. There was a minority case brought to your Honor's attention, minority only, that under some circumstances voice can be given by a juror what he thought and he can protest that he was not prejudiced. Well, I say again, your Honor, that the defense has no doubt but what Mr. Smith, doing what he did, was doing so with every honest effort to be a most conscientious and orthodox juror, to follow out, to the best of his ability, the admonitions and prohibitions that were given to him by the judge presiding at the trial, but we think that Mr. Smith, with all due respect to him, is only human, and we think that, being only human that he is disinclined to admit that he was prejudiced or affected or intimidated or concerned: he felt he was pointed out, was under scrutiny or possibly under investigation and that he ought to lean over backwards to show that nothing in [275] the way of any proposal of any benefit

that might come to him if he strung along with Bonies Remmer would affect his verdict and that he wasn't going to string along with him. We say, Mr. Smith, like practically every human being I know of, is the poorest person in the world to judge his own frame of mind in regard to prejudice and fairness, and in keeping with that fact—it is not original with me, of course—I would like to ask your Honor's indulgence to read a brief extract from Stone vs. U. S., 130 Fed.(2), page 70, and particularly the language found on page 77, where the Court says this on the proposition:

"Jurors are human and are not always conscious to what extent they are in fact biased or prejudiced, and their inward sentiments can not always be ascertained. In the present case, the juror commendably showed anxiety at the approach to him concerning the case and whether he leaned one way or the other because of the occurrence, is beyond ascertainment."

And so we say, may it please the Court, that Mr. Smith, Mr. Smith who knew that within the first month of the trial he was in the middle of an incident, however unwelcome it was, and that the federal judge had seen fit to undertake an investigation, and it was never brought to his attention that the investigation was ever ended or how it was progressing or [276] whether Mr. Satterly had been contacted and what Mr. Satterly might have said about it, true or untrue, Mr. Smith didn't know just what his position was in the eyes and under the scrutiny of the Federal Bureau of Investigation or the

United States attorney's office, with all of that on his mind—and we know it was on his mind, we know it was still disturbing him and wrangling in his mind after the trial was concluded and driving home with his friend Tinkham, we say, may it please the Court, that Mr. Smith is the last person in the world who could give your Honor an intelligent analysis of his own state of mind, and we say, may it please the Court, that the government has failed to meet the burden of showing your Honor affirmatively, not only that there did not exist a condition which created prejudice, that they did not overcome the presumption of prejudice and that they did not remove what the Court has said, the Supreme Court of the United States, remove the possibility that prejudice may have resulted from this extraneous contact.

I want to thank your Honor for the attention given us and we are looking forward to the opportunity, when the transcript is prepared, to submit some more thoughts on the law.

The Court: A matter I would like to make an inquiry about. Assuming that all of the evidence that was presented here, as you have interpreted it, was presented on the motion for a new trial before the [277] trial judge, is there anything in that evidence to give any substantial weight to the argument that those facts, if presented on the motion for a new trial, would have led to the conclusion that the defendant was harmed? What I mean by that is, we start out the case with a presumption the Supreme Court says exists, that any contact

with a juror is prejudicial. That is a general statement of law to protect and make valid the part the jury played, so there is an inference or presumption that this is prejudicial. However, when all of the facts were exhibited, as they would be on a motion for a new trial, we then have to determine, as a matter of fact, rather than as a matter of law, whether or not the facts as stated showed that there was harm or not to the defendant. Now isn't it important, in resolving that issue, to show whether or not the facts as presented indicate any harm to the defendant. Do we enter the field when we have the whole record in, do we enter the field of conjecture or speculation, which is more or less the basis of the rule of presumption, because the rule of presumption does not depend upon facts at all. It depends upon a reaching out of the minds to establish a rule that has been established [278] and applies to all proceedings in which the jury is involved.

Now if we enter that field, what do you say the evidence shows that indicates that the juror in question had a prejudice against the defendant? His mind may have been influenced, assuming the argument, the statement in the Stone case, and taking that into account, his mind may have been affected, but is there anything to show that his mind might not have been affected in favor of, by the incident involved, as well as against the defendant, and can we at that point base our decision on inferences or presumptions? Are we not then confined to the question of fact, as to whether or not the juror was

influenced in such a way as to be harmful to the defendant, not in such a way as his judgment might not have been affected in one way or another, but it was affected in such a way as was harmful to the defendant. I think in the last analysis that is the problem that is presented here, and I am just suggesting it to you now as a subject you might file a memorandum on, to show whether or not there is any law helpful on that subject. I do not think it is as easy a conclusion to come to as perhaps you have stated—I am not [279] saying this in criticism of your argument, but I think when you come to a question of fact in this matter, we have to look at the evidence a little differently than if we were dealing in a problem that involves only presumptions of prejudice. If that were not the case, I think there would have been no reason for remand of this case at all. I do not say this in any criticism of the Supreme Court. If they regarded that as important enough, then they could have decided that question on the mere basis of presumption. It didn't make any difference how the matter was brought about, the fact that there was a contact made, so when the Supreme Court has relegated this matter for a factual hearing, which is a proper hearing on a motion for a new trial, and while there isn't much factual dispute in the case, and I think practically none in material respects, the Court still has to determine from those facts whether or not that was in fact, on the basis of those facts, a situation that was harmful to the defendant. I think there might be some cases on that, further than these cases that

have been presented, although it is an unusual matter in the status in which it is.

Mr. Gillen: I will say this, your Honor, I do not think [280] there can be any question about it, but there can be extraneous contacts with jurors that, if they are complained about, upon being inquired into, can be shown to be harmless. For example, a lawyer seen talking to a juror on the street, it might develop on inquiry, or when the complaint is made, it was extraneous contact, that it was harmless. That is the case of Ryan vs. U. S., 191 F(2), page 779. There was a complaint the prosecutor was seen talking to several jurors. There was an inquiry made about it and it developed (1), part of the conversation was a little ribbing of the United States attorney about some funny incident that had occurred in a case that he had been interested in in his official capacity, they were kidding about that; and (2) the other matter was one of the jurors said, "You know, when I was being examined on voir dire by the defense attorney and he asked if any one of us had ever been robbed or had anything stolen from us"—these men were charged with robbery—"if any of us had been the victims of a robbery which might bring prejudice in our mind against any person charged with robbery, well, a mirror was stolen out of my automobile. Do you suppose I should have told, and the prosecutor said, 'Not unless it was prejudice in your mind, I do not think so.'" and it was held the first conversation was entirely harmless and the second incident was a matter they felt created no

prejudice in the mind of the juror. I think the burden rests heavily on the government not to show that the extraneous contact was, in [281] fact, not harmful, but as a matter of fact it could not have been harmful. Reading again——

The Court: (Interceding) I do not know what that means. If it wasn't harmful, it wasn't harmful. If you go further and say it could not have been harmful, then you enter the field of speculation.

Mr. Gillen: That is what I say. I think it means this, the fact, evidence, has to be so concise and clear to any logical human mind, you have to say this could not have been harmful.

The Court: I wouldn't put it exactly that way. I would say so you can make a finding in fact it was not harmful. If that were not so, the Court, having evidence before it, could say, "I have seen the witnesses, I have appraised them and their testimony, and it is my conclusion what happened was not harmful", but even though I had made that finding, somebody else might have a different view; or there might be some other possibility, and therefore, even though I found it wasn't harmful, I am going to still hold it was harmful because, despite my mind, it might have been harmful. I think it is all inconsistent in legal reasoning. I saw that language. I am not inclined to think there is much logic to it. However, that [282] is a question as to how far we should go in protective devices to preserve the effectiveness and impartiality of the jury system.

Mr. Gillen: May I say this—Mr. Avakian calls the matter to my attention—in view of your Honor's

statement, that one reason for the remand was that if the circumstances were—no record was made—since the presumption is not conclusive, the Supreme Court can not decide because they are without a record.

The Court: That is what they said, there is no question about that, although they did make some comments on the law they said that may or may not be applicable, depending on what the record shows. I do not think the lower court will take issue, I think most lower courts would be in agreement with statements of the Supreme Court, so it wouldn't make much difference whether we are in agreement or not, it is the law, but I think any judge would agree those are sound statements with respect to contact of a juror. It is only a question whether the facts of the case were within the principles stated. I have just stated this in case it is something you want to do. Is there any reply argument?

Mr. Graves: Yes. May it please your Honor and counsel: Inasmuch as we know your Honor has practiced law for thirty years, Mr. Gillen for twenty-six years, I feel with twenty years [283] I am junior here, so you must overlook my ignorance perhaps, but nevertheless during Mr. Gillen's argument he cited the Stone case. Now in the Stone case, the language he read to you from that case, the reason a new trial was given in that case was that after the juror told the judge about this contact and the judge told him to keep his mouth shut and forget it, still the judge told all the other eleven

jurors and that was why that case was reversed; and in the Ryan case cited to your Honor, that was a case that a juror was defending his verdict, which is what your Honor permitted Mr. Smith to do in this case.

Perhaps Mr. Gillen has read a good many comics. He used the expression "G man." You saw the type of person Mr. Callister was. I am satisfied there was no leak from the United States attorney's office and no leak from the FBI and I will state Hubert Boyd—I have known Mr. Boyd for some time—when he was on the stand here told the Court that he has never, in any case, spoken to any juror about a case. I believe Mr. Boyd and I suggest that possibly Mr. Curnow, two and a half years after the incident, might have fancied such a thing happened. I do not know.

But a few other remarks Mr. Gillen made I want to reply to. He said he thinks there was such a contact between Mr. Boyd and Mr. Curnow. I do not think that is anything very relevant. By some token he believed it was Mr. Smith who said he was under pressure. My recollection of the testimony is Mr. [284] Tinkham explained he thought he said it, *he* was the sort of remark he would make. When he talks about efficiency, I think Mr. Smith is one of the most efficient people I have seen. That is for your Honor to decide.

Now this matter Mr. Gillen touched on, in the record of this case, in their motion for a new trial, they cite articles in the San Francisco Examiner and Oakland Tribune and in those articles, as will

appear in the record, my recollection is that it was Judge Foley who told the press. The question I have in mind, he assumed there was no leak from the United States attorney's office and no leak from the marshal's office, because the marshal knew nothing about this incident, and certainly there was no leak from the FBI. Who gave the newspaper reporter a tip? That is something to conjecture about. Maybe because of the fact they never asked who it was, maybe they knew. I don't know; I am not saying—it is just something we can all conjecture about ourselves.

Now when Mr. Gillen tells your Honor if somebody came up to him and said, "Mr. Gillen, how about robbing a bank" and he says, "I will go home and get my burgler tools", it is a joke, I say to your Honor, I do not care how close a friend of mine, as a joker, if somebody came to me in the United States attorney's office or in the prosecutor's office and said to me, "Look, take it easy on Bones Remmier; you might get $15,000", I would blow [285] my top, and I say when this man, who was a friend of Mr. Smith's, during the conversation in Mr. Smith's home—and incidentally it was a long 28-foot living room and Mr. Smith was at one end and Mrs. Smith at the other end—I say I believe Mr. Smith had every justification in raising his voice. It is exactly the same thing any other honest man would do, and Mr. Smith did say that. Now I think there is nothing wrong with that course of conduct.

Now Mr. Gillen made the remark also so far as

the FBI was concerned, they did not come in with a written report until March, 1952. Perhaps he does not realize, but I do now, that the FBI are busy. As a matter of fact, before we come into court, we are supposed to have a report. I say that the reason that the United States attorney's office did not take any proceedings against Mr. Satterly was because, as practically always, they realized that they could never prove a case to a jury without the report of the FBI and no United States attorney, in my opinion, would present such a case. It all makes sense. I can't remember just the words Mr. Gillen said his recollection of the testimony and conclusion was, but it was Judge Foley who suggested to Mr. Smith that this was a joke. Perhaps Mr. Gillen does not know Judge Foley as well as we of the United States attorney's office. Judge Foley is not the type of man who will make a joke of any such incident, and if Judge Foley says, and he so testified, that he concluded this thing as a joke, you [286] can rest assured, your Honor, that he got it from Mr. Smith, that he did not suggest it to Mr. Smith, that Mr. Smith said, "Well, everything considered, I think it is a joke, your Honor." I think that is what happened.

So, if your Honor please, I think your Honor's remarks, in observing Mr. Gillen's statement this morning, about the fact, let us assume everything is true they are contending, let us assume Mr. Boyd wasn't telling the truth—I believe he was—let us assume he did talk to that juror, let us assume perhaps it was not a joke, nevertheless the question

remains, as your Honor pointed out, was Mr. Rommer prejudiced against, and there again your Honor put your finger on the matter when you said, what was the intention, what could any reasonable person conclude? I think there is only one answer in this case, and so, your Honor, as we have cited to you and as Mr. Gillen cites in the cases in his memorandum—we only added one to them—there have been many cases but we cite the Stone, Rakes and Higgins cases, where there have been attempts to tamper with a juror by offering them a bribe and in every one of those cases, particularly the Higgins case, where there was conviction of this woman who offered the bribe to the juror, the juror was permitted to testify that he was not prejudiced and the Court said, despite the fact there was a great probability, they had better have an investigation. And there it is, your Honor. Take it in the most unfavorable position, and that [287] is what you have to do, insofar as the government is concerned. I do not see how you could reach any other conclusion than that this entire incident was not prejudicial. As I pointed out in my opening argument yesterday, this was not an investigation of Mr. Smith and what Judge Foley told you was he merely suggested to the chief assistant United States attorney, Mr. Thompson, that an investigation should be made; he did not tell him what to do. It was Bruce Thompson who testified here yesterday he had the investigation made because, in his opinion, from what he heard, it might very well have been a violation of the federal statute of jury

tampering, and there was an investigation of this case and investigation of this man, and there it is; and so far as the government is concerned, I want to say this, I feel we would be willing, Mr. Gillen, to submit the matter to your Honor. You have heard all the evidence. I see no necessity for writing briefs. I am not trying to get out of any work, but I do not think it is necessary, but if that is the order, naturally we will comply. I do not think it is necessary so far as the government is concerned.

The Court: I am inclined to agree it is not necessary but I think, due to the unusual proceeding itself, if counsel wants an opportunity to furnish a brief, it would be a full presentation of the matter.

Mr. Gillen: We would like to do that. May I say one [288] thing. I think Mr. Graves misconstrued what I said. I did not say I believed it was Judge Foley who suggested it was a joke. I agree, I think the word "joke" came from Mr. Smith rather than from Judge Foley.

[Endorsed]: Filed June 18, 1954.

[Endorsed]: No. 14,508. United States Court of Appeals for the Ninth Circuit. Elmer F. Remmer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed: September 10, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit.

No. 14,508

ELMER F. REMMER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

## STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The points on which appellant intends to rely on appeal are as follows:

1. The Court (Judge Goodman) erred in finding and ordering that the extraneous jury contacts shown by the evidence were harmless to the defendant and/or in no way affected the fairness of the trial or the jury's verdict.

2. The Court (Judge Goodman) erred as a matter of law in holding that prejudice to the defend-

ant as a result of the extraneous jury contacts would have to appear affirmatively as a fact in order to warrant a new trial.

3. The Court (Judge Goodman) erred as a matter of law in not holding that a new trial must be granted on a showing of extraneous jury contacts unless the absence of prejudice to the defendant is affirmatively shown as a fact.

4. The Court (Judge Goodman) erred as a matter of law in not holding that the presumption of prejudice arising from extraneous jury contacts can be overcome only by an affirmative showing that in fact no reasonable possibility of prejudice existed.

5. The Court (Judge Goodman) erred in admitting into evidence, over objection, the testimony of the juror Smith as to the effect of the extraneous jury contacts on his state of mind.

6. The Court (Judge Goodman) erred in finding that the investigation was concerned exclusively with the conduct of Satterly and was in no way concerned with the conduct of juror Smith.

7. The Court (Judge Goodman) erred in finding that the presumption of prejudice was conclusively disspelled.

8. The Court (Judge Goodman) erred in holding that the admitted error arising from Judge Foley's deliberate omission to disclose the extraneous jury contacts to defense counsel was harmless, and in not holding that the defendant was prejudiced by the deliberate denial to him of an opportunity to participate in a prompt investigation of the extraneous jury contacts.

9. The Court (Judge Goodman) erred in holding that the incident involving the juror Curnow (mentioned without name in footnote 3 of Judge Goodman's opinion) was outside the scope of the hearing, and in holding that said incident had no effect on the jury's verdict.

10. The Court (Judge Foley) erred in denying defendant's motion for a bill of particulars.

11. The Court (Judge Foley) erred in denying defendant's motion to inspect and take copies.

12. The Court (Judge Foley) erred in denying defendant's motion for production of books, papers and documents and in quashing the subpoena for their production.

13. The Court (Judge Foley) erred in denying defendant's motion for return of books, papers and documents and suppression of their use in evidence, and for permission to adduce testimony in support of the motion.

14. The Court (Judge Foley) erred in denying defendant's motion for judgment of acquittal at the close of all the evidence.

(a) The use of the net worth method was not proper because:

(1) There was no showing that the Commissioner of Internal Revenue had determined, pursuant to Section 41 of the Internal Revenue Code, that the method of accounting employed in keeping defendant's books does not clearly reflect the income of himself and his wife, or that said Commissioner

had determined that the net worth method does clearly reflect said income;

(2) There was no showing that the method of accounting employed in keeping defendant's books does not clearly reflect the income of himself and his wife, or that the net worth method does clearly reflect said income;

(3) There was no showing that the amount of income of defendant or his wife, or both, as shown in the government's net worth computations, was established by a return or list made by The Commissioner of Internal Revenue, or by a Collector or Deputy Collector of Internal Revenue with the approval of said Commissioner, pursuant to Section 3612 of the Internal Revenue Code;

(4) There was no showing that the books and records of the enterprises from which defendant derived income were not adequate to clearly reflect the income of himself and his wife;

(5) The starting point net worth was not established;

(6) The net worth at each succeeding year end throughout the period covered by the indictment was not correctly computed in the government's net worth computations.

(b) There was no showing that the partnerships between defendant and various other persons were fraudulent.

(c) There was no showing that any income was omitted from the returns of defendant or his wife with intent to defeat or evade the tax liability of

either one, or that any improper deductions were taken on said returns with such intent.

(d) There was no showing that defendant fraudulently attempted in any manner to defeat or evade the income tax liability of himself or his wife.

15. The Court (Judge Foley) erred during the direct examination of government witness Agnes Badobinatz in admitting in evidence, over defendant's objection, and in refusing to strike, testimony of the witness that in February of 1947 her husband, now deceased, "said that he had to go to the bank to get a cashier's check for five thousand dollars to pay Mr. Remmer the money that he had borrowed", defendant's objection to the admission and retention of such evidence and which the court overruled being that it called for "the grossest and rankest hearsay", and there "was no foundation laid" to establish when the indebtedness to defendant was incurred. T. 628, 630, 637-638.

16. The Court (Judge Foley) erred, after sustaining an objection by the government, in rejecting defendant's offer to prove by direct examination of witness James Jeffress that in July of 1944, his father, Robert L. Jeffress, now deceased, told him that in February of 1943 he had borrowed the sum of ten thousand dollars and that he then in July, 1944, still owed Elmer Remmer the ten thousand dollars, the government's objection to the offer of proof, which the court sustained, being "upon the ground it calls for hearsay evidence and that the proof offered is not the primary evidence of the

transactions which are sought to be proven". T. 3203-3205, 3207.

17. The Court (Judge Foley) erred during the cross-examination of government witness Schriber in rejecting as evidence, after sustaining the government's objection, Defendant's Exhibit Z for identification (T. 3664), to wit, a written statement signed by the witness and reciting among other things that defendant paid Schriber the sum of $50,000 and not $75,000, in 1945, on account of the purchase price of $175,000 for the Menlo Club, the government's objection which the court sustained being "on the grounds that the document purports to be a summary of some kind made in 1949, purporting to be a recitation of certain facts which are signed with the name Gene Schriber and that of Elmer L. Remmer, agreeing to the facts". T. 2831-2832.

18. The Court (Judge Foley) erred during the cross-examination of government witness Weaver respecting Plaintiff's Exhibit No. 165 (T. 3597-3599), prepared by the witness and having reference to the Menlo Club, in rejecting evidence, after sustaining the government's objection, sought to be adduced through a hypothetical question propounded to the witness and designed to show that if defendant bought a business for $175,000 and entered into a partnership for its operation, it would be proper accounting procedure to enter in defendant's capital account a credit in the sum of $175,000 representing the cost of the business contributed to the partnership, the government's objec-

tion which the court sustained being on grounds "assuming facts not in evidence, not containing, in other words, a proper statement of the evidence as it is presently before the Court: third, it is not proper cross-examination and not within the scope of the direct examination". T. 2597-2600.

19. The Court (Judge Foley) erred during the cross-examination of government witness Weaver respecting Plaintiff's Exhibit No. 165 (T. 3597-3599), prepared by the witness and having reference to the Menlo Club, in rejecting evidence, after sustaining the government's objection, that in preparing the Exhibit there was uncertainty on the part of the witness as to whether certain expenditures were to be classified as capital expenditures rather than current expenses, the government's objection which the court sustained being on grounds that the evidence was "immaterial and incompetent". T. 2647.

20. The Court (Judge Foley) erred during the direct examination of government witness Brady in admitting in evidence, after overruling defendant's objection, plaintiff's Exhibit No. 183 (T. 3612-3613), prepared by the witness and purporting to reflect the net worth and net income of defendant and his wife for the prosecution years, defendant's objection which the court overruled being on the ground "it is incompetent, irrelevant, and immaterial. It is based on the erroneous conclusions of law and it assumes facts not in evidence and in many instances it assumes facts directly contrary

to the evidence presented by the government", T. 517-538, 2856-2857.

21. The Court (Judge Foley) erred during the direct examination of government witness Brady in admitting in evidence, after overruling defendant's objection, testimony of the witness that the total tax liability for defendant and his wife in 1944 would be $10,821.86 each, defendant's objection which the court overruled being that "it is incompetent, irrelevant, and immaterial, that it calls for conclusions of law, and more specifically that it is based upon assumptions of fact which are not covered by the evidence and upon assumptions of fact which are contrary to the evidence", T. 2860-2861.

22. The Court (Judge Foley) erred during the direct examination of government witness Brady, in admitting in evidence, after overruling defendant's objection, testimony of the witness that the total tax liability for defendant in 1945 would be $16,951.49, and for his wife $18,006.18, defendant's objection, which the court overruled, being that "it is incompetent, irrelevant, and immaterial; calls for the witness' conclusions of law, and more specifically it assumes facts which are not in evidence and assumes facts which are contrary to the uncontradicted evidence", T. 2860-2863.

23. The Court (Judge Foley) erred during the cross-examination of government witness Brady in rejecting defendant's offer to prove through cross-examination of Brady that the prosecution had in its possession books and records maintained by the various businesses listed in plaintiff's Exhibit 183,

which books, records and papers the prosecution had not produced in court, and that the production of those additional books, records and papers would disprove the testimony of Brady and other prosecution witnesses to the effect that the books and records maintained by such businesses were inadequate and insufficient. T. 2914. The offer of proof was denied. T. 2916.

24. The Court (Judge Foley) erred in refusing to instruct the jury in words or substance as requested in Defendant's Requested Instruction No. 108.

25. The Court (Judge Foley) erred in refusing to instruct the jury in words or substance as requested in Defendant's Requested Instruction No. 109.

26. The Court (Judge Foley) erred in refusing to instruct the jury in words or substance as requested in Defendant's Requested Instruction No. 114.

27. The Court (Judge Foley) erred in refusing to instruct the jury in words or substance as requested in Defendant's Requested Instruction No. 111.

28. The Court (Judge Foley) erred in refusing to instruct the jury in words or substance as requested in Defendant's Requested Instruction No. 124.

29. The Court (Judge Foley) erred in refusing to instruct the jury in words or substance as requested in Defendant's Requested Instruction No. 129.

30. The Court (Judge Foley) erred in denying defendant's motion for a new trial.

Dated this 14th day of September, 1954.

/s/ JOHN R. GOLDEN,
For Appellant's Attorneys.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 16, 1954. Paul P. O'Brien, Clerk.

[fol. 335] In Supreme Court of the United States,
October Term, 1953

No. 304

Elmer F. Remmer, Petitioner,

vs.

United States of America

Order Allowing Certiorari—Filed November 16, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

A true copy. Test:
Harold B. Willey, Clerk of the Supreme Court of the United States. (S.) by Hugh W. Barr, Deputy.

[File endorsement omitted.]

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[fol. 336] In Supreme Court of the United States,
October Term, 1953

No. 304

Elmer F. Remmer, Petitioner,

vs.

United States of America

On writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Judgment—March 8, 1954

This cause came on to be heard on the transcript of the record from the United States Court of Appeals for the Ninth Circuit, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals, in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Nevada with directions to hold a hearing to determine whether the incident complained of respecting a juror was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.

March 8, 1954.

The Chief Justice took no part in the consideration or decision of this case.

A true copy. Test:
Harold B. Willey, Clerk of the Supreme Court of the United States. (S.) by Hugh W. Barr, Deputy.
(Seal of the Supreme Court of the U.S.)

[File endorsement omitted.]

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[fol. 337] In Supreme Court of the United States,
October Term, 1953

No. 304

Elmer F. Remmer, Petitioner,

vs.

United States of America

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Order on Petition for Rehearing—January 10, 1955

On Consideration of the motion for leave to file and petition for rehearing in this case, it is ordered by this Court as follows: The motion for leave to file and the petition for rehearing are granted. This case is restored to the docket, and the whole record, including the findings and order of Judge Goodman, is remanded to the Court

of Appeals for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in Holland v. United States, Friedberg v. United States, Smith v. United States, and United States v. Calderon, and Judge Goodman's findings and order.

January 10, 1955.

Mr. Justice Black would reverse the judgment of conviction and grant a new trial in view of the jury incident discussed in Remmer v. United States, 347 U.S. 227.

The Chief Justice took no part in the consideration or decision of this case.

A true copy. Test:

Harold B. Willey, Clerk of the Supreme Court of the United States. (S.) by Hugh W. Barr, Deputy. (Seal of the Supreme Court of the U.S.)

[File endorsement omitted.]

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[fol. 338] [Caption omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,281 and 14,508

ELMER F. REMMER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

ORDER ON MOTION TO CONSOLIDATE CAUSES, ETC.—April 11, 1955

Ordered motion of appellant to consolidate causes, etc., presented by Mr. John R. Golden, counsel for appellant.

Good cause therefor appearing, It Is Ordered that the motion to consolidate appeal in cause No. 14,508, with the appeal in cause No. 13,281, be and hereby is denied, and

that the appeal in cause No. 14,508, be, and hereby is dismissed; and that a Judgment be filed and entered accordingly.

It Is Further Ordered that the transcript of record bearing cause No. 14,508, be filed as a supplemental transcript of record in cause No. 13,281.

Mr. John R. Golden and Mr. Spurgeon Avakian orally move the court that leave be granted to counsel for both parties to brief in appeal No. 13,281, the questions presented by the supplemental transcript of record and other issues in the cause, as provided by rule, and that oral arguments be granted on all the issues in the cause, and said motion is submitted to the Court for consideration and decision.

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[fol. 339] In United States Court of Appeals for the Ninth Circuit

No. 13,281

Elmer F. Remmer, Appellant,

vs.

United States of America, Appellee

Order—Filed April 11, 1955

This court's orders of March 14, 1955, and March 25, 1955, are hereby vacated. Counsel for appellant and counsel for appellee are hereby directed to serve and file supplemental briefs within 30 days from the date of the filing of this order. Such briefs shall discuss, and be limited to, (1) questions heretofore raised by appellant concerning the so-called net worth method of computation said to have been used by appellee and its agents in computing the taxable income of appellant and his wife for the years 1944 and 1945, and in proving or attempting to prove the amount of such income, and (2) questions raised by appellant in and by paragraph 17 of his motion for a new trial and the affidavit attached to said motion. Said questions shall be discussed in the light of the Supreme Court's decisions in Holland v. United States, 348 U.S. 121; Fried-

berg v. United States, 348 U.S. 142; Smith v. United States, 348 U.S. 147; United States v. Calderon, 348 U.S. 160, and (2) the findings and order of District Judge Louis E. Goodman made and filed in the District Court on July 19, 1954. Upon the filing of such briefs, or upon the expiration of said 30 day period, (whichever is earlier), this case shall stand submitted to this court.

(S.) Clifton Mathews, William E. Orr, James Alger Fee, United States Circuit Judges.

[File endorsement omitted.]

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[fol. 340] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—May 23, 1955

Ordered that the typewritten per curiam opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

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[fol. 341] In United States Court of Appeals for the Ninth Circuit

No. 13,281

Elmer F. Remmer, Appellant,

vs.

United States of America, Appellee

Appeal from the United States District Court for the District of Nevada

Before Mathews, Stephens and Orr, Circuit Judges

Opinion—May 23, 1955

Per Curiam:

In this case, a judgment of the District Court was affirmed by us on May 28, 1953.[1] The Supreme Court granted

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[1] Remmer v. United States, 9 Cir., 205 F. 2d 277.

certiorari[2] and on March 8, 1954, vacated our decision and remanded the case to the District Court[3] with directions to hold a hearing to determine whether an incident which occurred during the trial and was reported to the District Court by a juror[4] was harmful to appellant, and if after hearing it was found to have been harmful, to grant a new trial.

Accordingly, the District Court (Judge Louis E. Goodman presiding) held a hearing, and Judge Goodman, on July 10, 1954, filed his opinion, findings and order, thereby finding and determining that the incident was harmless [fol. 342] to appellant. A certified copy of Judge Goodman's opinion finding and order having been transmitted to the clerk of the Supreme Court, and appellant having moved the Supreme Court for leave to file a petition for rehearing, the Supreme Court, on January 10, 1955, made the following order:[5]

"'The motion for leave to file and the petition for rehearing are granted. This case is restored to the docket, and the whole record, including the findings and order of Judge Goodman, is remanded to the Court of Appeals for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in Holland v. United States, 348 U.S. 121; Friedberg v. United States, 348 U.S. 142; Smith v. United States, 348 U.S. 147; and United States v. Calderon, 348 U.S. 160, and Judge Goodman's findings and order.'"

We have complied with the Supreme Court's order and have concluded that our decision of May 28, 1953, and Judge Goodman's findings and order were correct. The judgment affirmed by us on May 28, 1953, is, therefore, again affirmed.

[File endorsement omitted.]

---

[2] Id., 346 U.S. 884.

[3] Id., 347 U.S. 227.

[4] The incident was described in our opinion (205 F. 2d 277, 291) and in the Supreme Court's opinion (347 U.S. 227, 288).

[5] Remmer v. United States, 348 U.S. 904.

[fol. 343] In United States Court of Appeals for the Ninth Circuit

No. 13,281

Elmer F. Remmer, Appellant,

vs.

United States of America, Appellee

Judgment—Filed and Entered May 23, 1955

Appeal from the United States District Court for the District of Nevada

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly resubmitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted.]

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[fol. 344] Clerk's Certificate to foregoing transcript omitted in printing.

---

[fol. 345] Supreme Court of the United States, October Term, 1955

[Title omitted]

Order Allowing Certiorari—Filed October 10, 1955.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted; limited to questions presented under III A of the petition for the writ.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this application.

Office Sup. Ct. U. S.
FILED
JUN 17 1953
HAROLD B. WILLEY, Clerk

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1953

No. 156

ELMER F. REMMER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
## to the United States Court of Appeals
## for the Ninth Circuit.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
Crocker Building, San Francisco 4, California,
SPURGEON AVAKIAN,
Financial Center Building, Oakland 12, California,
*Attorneys for Petitioner.*

LOUISE AND FRY,
220 South Virginia Street, Reno, Nevada,
*Of Counsel.*

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1954

No.

ELMER F. REMMER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI

**to the United States Court of Appeals for the Ninth Circuit.**

Petitioner Elmer F. Remmer, by his counsel, prays that a Writ of *Certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 23, 1955, affirming the judgment of the United States District Court for the District of Nevada.

## I. OPINIONS BELOW

The opinion of the Court of Appeals, filed on May 23, 1955, is appended to this petition as Appendix A (*infra*, pp. i-iii). The prior opinion of the Court of Appeals dated May 28, 1953, is reported at 205 F. 2d 277 and is set forth at pages 3748-77 of the Record.[1] The Opinion, Findings, and Order of the District Court filed July 10, 1954, after a hearing previously ordered by this court in connection with extraneous jury contacts, is set forth at pages 33-39 of the Supplemental Record.[2]

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## II. JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals was entered on May 23, 1955 (Appendix B, *infra*, p. iv). An order staying mandate pending disposition of this Petition for *Certiorari* was entered on June 3, 1955 (Appendix C, *infra*, p. v). The jurisdiction of this court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

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[1] Inasmuch as 9 additional copies of the Record have been filed pursuant to Rule 21(4), the opinions set forth therein are not appended to this petition. Rule 23(1)(i).

[2] The Opinion, Findings, and Order is not appended hereto for the reasons set forth in footnote 1. The entire record on the hearing conducted pursuant to the Supreme Court's prior order was ordered filed by the Court of Appeals as a Supplemental Record and will be designated herein as "Supp. R. ". The references to the original record will be designated as "R. ".

## III. QUESTIONS PRESENTED

### A. Questions Relating to Extraneous Jury Contacts

1. Where this court, on the basis of an affidavit setting forth newspaper stories to the effect that during a tax evasion trial a juror reported to the trial judge that he had been approached by an outsider with the suggestion that he "make a deal" with the defendant and that the trial judge and the United States Attorney had sent an FBI agent to interview the juror but had kept all these facts secret from the defendant and his counsel, has held that extraneous contacts with a juror raise a presumption of prejudice and has ordered the District Court to conduct a hearing to determine what occurred and to grant a new trial if the incidents are found to have been harmful:

(a) Is the scope of such hearing limited to the extraneous contact between the juror and the FBI agent, or does it include the extraneous contacts between the juror and the outsider, and between the juror and the trial judge?

(b) Does the scope of such hearing include a showing that a deputy United States Marshal inquired of another juror as to whether he had been approached and that the deputy marshal stated, in substance, that an effort had been made to approach a juror; or is the scope of the hearing limited to extraneous contacts involving only the one juror mentioned in the newspaper articles?

2. Where an outsider has stated to a juror during the trial that he knows the defendant, that the defendant received $350,000 "under the table" on the sale of a

business which is prominently mentioned throughout the trial, and that the juror should "make a deal" with the defendant, and (as a result of the juror's report of the incident to the trial judge) the FBI interviews the juror regarding the incident and then holds its investigation in suspense for over two months until after the verdict, and the juror is never advised of the falsity of the statement regarding the $350,000 and is never advised that the outsider actually had no connection with the defendant, is the presumption of prejudice overcome by a showing that the FBI agent advised the juror that he was investigating the outsider (rather than the juror)?

3. In such a situation, where the evidence of the statement regarding the alleged receipt of $350,000 in "under the table" money by the defendant was not disclosed until after the juror had left the stand at the hearing, and he was never recalled for questioning regarding it, and no evidence whatsoever was presented as to the impact of this remark on the juror, was the court justified in holding that the incident was in fact harmless?

4. In such a situation, is the presumption of prejudice simply a procedural rule which merely obligates the prosecution to come forward with the evidence of the extraneous contacts, or does the presumption require that the prosecution carry the burden of an affirmative showing that the defendant was not prejudiced by the impact of those contacts on the jurors?

5. In such a situation, where the extraneous contacts involve serious (but false) statements that the defendant is a tax evader, and a suggestion of bribery, and a statement by a deputy marshal to another juror that an at-

tempt had been made to influence a juror, is a new trial required unless the evidence shows that there was no reasonable possibility of prejudice to the defendant?

**B. Questions Relating to Inspection and Production of Defendant's Business Records in the Possession of the Prosecution, Under Rules 16 and 17 of the Federal Rules of Criminal Procedure.**

1. Does Rule 16 of the Federal Rules of Criminal Procedure, providing for a motion for inspection of records "at any time after the filing of the indictment," authorize the denial of a motion on the ground that it is not timely?

2. If timeliness is an element, does the Rule permit the time to be charged against the defendant, where he shows that the Government has contributed to the delay?

3. Does Rule 16 authorize the court, without itself examining the records, to substitute its judgment for the defendant's and to deny inspection of the records on the ground that it disagrees with the defendant's appraisal of the expected benefits?

4. Where defendant's motion specifies the type of business records and shows that they relate to the businesses from which the defendant is alleged to have derived his income, does Rule 16 require a showing of the specific pertinency of each individual paper?

5. Where there is no suggestion that compliance with the subpoena would have hampered the prosecution in any way, and the subpoena is served on the prosecutors several days before the trial, does Rule 17 of the Federal Rules of Criminal Procedure permit the quashing of a

subpoena for the production of defendant's business records in the prosecution's possession, and the denial of a motion for preliminary inspection of such records, on the grounds that the motion was not timely, that production of the records would not be beneficial to the defendant, and that the defendant had failed to show the specific need for any particular papers?

6. Is the denial of such motions under Rules 16 and 17, and the quashing of the subpoena, justified by the fact that, two years prior to the indictment, the Government afforded defendant's accountant an opportunity to examine such records in connection with the preparation of a Tax Court petition contesting civil tax deficiency assessments for the same years, where the civil assessments were based on computations and theories different from that on which the prosecution was based?

**C. Questions Involving Application of Net Worth Method.**

1. Where the prosecution by its own uncontradicted evidence shows that there was substantial cash at the starting point, may it submit net worth computations to the jury which designate the item of cash with a question mark and ignore it in computing the amount of income?

2. In such a situation, where the existence of cash in an undetermined amount is shown by the prosecution's uncontradicted evidence, does the defendant have the burden of proving the amount of such cash?

3. In computing income on the net worth method, must the traditional, basic distinction between the cash and the accrual methods of accounting be observed? Or may accounts receivable, arising from the extension of charge

account credit to customers, be included in the closing net worth of a cash basis taxpayer?

4. Where the prosecution refuses to produce, or to permit inspection of, a large quantity of the defendant's own records, has it made the full and fair disclosure required for the use of the net worth method?

5. Can a conviction on the net worth method stand where the defendant was precluded, by an erroneous ruling of the court, from introducing evidence of a substantial asset which was not included in the prosecution's starting point net worth computation?

6. Where there is no evidence of any particular item or category of unreported income, and the prosecution rests entirely on net worth computations, and the government is permitted to introduce a net worth exhibit which designates the amount of cash with a question mark, is it proper to refuse instructions which explain the circumstantial nature of the net worth method, the assumptions on which it rests, the importance of establishing the starting point net worth, and the burden of proof which the Government must carry?

7. In such a situation, is it sufficient for the court to instruct the jury only that (a) a defendant's net worth is the difference between all of his assets and all of his liabilities, (b) an increase in a man's net worth justifies the inference of taxable income if it is shown that he did not get it by gift or inheritance, and (c) non-deductible expenditures should be added to increase in net worth in arriving at taxable income?

8. Where the prosecution's net worth computations produce a tax deficiency primarily because they reflect

were used to siphon money secretly to appellant. On the contrary, the partners were all active in the supervision and conduct of the various businesses. One of the partners in 110 Eddy Street, Frank Cavani, testified that he was not consulted when Turner became a partner, but this occurred in 1943 during Cavani's long illness (which lasted almost a year) and Turner's entry into the business did not change Cavani's partnership interest. After Cavani's recovery, he and Turner actively managed the business even to the extent of deciding on their own responsibility what their own weekly salaries should be. (R. 2074, 2107, 2112-3, 2106-7.)

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## VI. ARGUMENT.

### A. THE HOLDING OF THE COURT BELOW IN CONNECTION WITH THE EXTRANEOUS JURY CONTACTS IS IN CONFLICT WITH THE RULE FOLLOWED IN OTHER CIRCUITS, AND IT MISCONSTRUES THE MANDATE OF THIS COURT.

The holding of the lower court presents serious questions involving the right to a trial by a fair and impartial jury. The District Court refused to follow the rules applied in other circuits. In addition, it misconstrued the mandate of this court in holding that only the FBI aspect of the extraneous jury contacts was involved in the hearing which this court ordered on March 8, 1954.

The Court of Appeals, in reviewing Judge Goodman's findings pursuant to this court's remand of January 10, 1955, issued only a short *per curiam* opinion which neither states the issues raised by petitioner nor explains the court's reasons for affirming the judgment; and, since the

the disallowance of partnerships and the making of tec
nical accounting adjustments, and where the preparatio
of the partnership returns as well as the defendant's r
turns was supervised by accountants and bookkeepe
who had full knowledge of all the facts, is it proper fo
the court to refuse to instruct the jury on the differenc
between corrupt intent and an erroneous claim, betwee
good faith and bad faith, between deceitful concealmen
and honest error, and instead to instruct the jury that
"wilful" intent to evade taxes includes doing a thin
"without *ground* for believing it is lawful, or conduc
marked by *disregard* whether one has the right so t
act"? (Emphasis added.)

---

## IV. STATUTES AND RULES INVOLVED.

The statutes and rules involved are set out in Appendix
I (*infra*, pp. xi-vii).

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## V. STATEMENT OF FACTS.

Petitioner was convicted in the District of Nevada on
February 22, 1952, after a trial lasting almost three
months, on four counts of tax evasion, of which two in-
volved his returns for the years 1944 and 1945, and two
involved the returns of his wife for the same years. The
jury disagreed with respect to two other counts involving
the returns of himself and his wife for 1946.

The case has been in this court twice before. On
November 16, 1953, this court granted a petition for *cer-
tiorari* which raised all of the questions involved herein

request for oral argument was denied, we have had no opportunity to ascertain, even by the inferences which may sometimes be drawn from the nature or tenor of judicial inquiry, the basis for the Court of Appeals opinion.

The District Court, however, clearly refused to follow the rule laid down by other circuits in *Stone v. United States* (CA 6, 1940) 113 F. 2d 70, 77; *Little v. United States* (CA 10, 1934) 73 F. 2d 861, 865; and *Ryan v. United States* (D.C. Cir. 1931) 191 F. 2d 779, 783. See also *United States v. Marine* (D.C. Del. 1949) 84 F. Supp. 785, 787.

These cases hold that, upon a showing of extraneous communications of a serious nature relating to the case (as distinguished from trivial departure from formalities, or casual conversation unrelated to the defendant or to the case), the presumption of prejudice requires a new trial unless the circumstances foreclose any reasonable possibility of harm.

In the language of the *Stone* case (113 F. 2d at 77):

> "The question is, not whether any actual wrong resulted from the conversation . . . under the circumstances related, but whether it created a condition from which prejudice might arise. . . ."

Judge Goodman's opinion specifically rejects this rule of law in the following language (Supp. R. 38):

> "But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact."

(except that the facts relating to extraneous jury contacts had not at that time been developed). *Remmer v. United States*, (1953) 346 U.S. 884. On March 8, 1954, without passing on any of the other issues in the case, this court ordered a remand to the District Court to conduct the hearing requested by petitioner with respect to extraneous jury contacts and to grant a new trial if "the incident complained of" was found to have been harmful. *Remmer v. United States* (1954) 347 U.S. 450.

The District Judge assigned to conduct said hearing made an order on July 10, 1954, that the "incident complained of" was harmless. Thereafter, in August, 1954, petitioner filed a petition for rehearing with this court requesting that the case be restored to the docket and that the other questions involved in the writ of *certiorari* be decided (No. 304, October Term, 1953). On January 10, 1955, this court granted the petition for rehearing, restored the case to the docket, and remanded the whole record, including the findings and order of the judge who conducted the hearing on the extraneous jury contacts, to the Court of Appeals

> ". . . for its consideration on the errors assigned when the case was before the Court of Appeals before in order that the Court on the whole record may reconsider the case in the light of our recent decisions in *Holland v. United States*, 75 S.Ct. 127; *Friedberg v. United States*, 75 S.Ct. 138; *Smith v. United States*, 75 S.Ct. 194; and *United States v. Calderon*, 75 S.Ct. 186, and Judge Goodman's findings and order.
>
> "Mr. Justice Black would reverse the judgment of conviction and grant a new trial in view of the jury

A similar and even more pointed rejection of the *Stone* case is found in Judge Goodman's comment on that case during oral argument, where he stated that the *Stone* case was "inconsistent in legal reasoning" and would require the court to "enter the field of speculation" (Supp. R. 318).

The lower court's refusal to follow the objective test of whether the evidence foreclosed all reasonable possibility of prejudice, and its determination that there was in fact no harmful impact, is squarely contrary to the reasoning of the *Stone* case that bias and prejudice are often unconscious; that "inward sentiments cannot always be ascertained", and that whether a juror "leaned one way or the other because of the occurrence, is beyond ascertainment." (113 F. 2d at 77.)

Thus, the *Stone* case, as well as the others cited above, hold that the presumption of prejudice can be overcome only by a showing that there is no reasonable possibility of prejudice, whereas the lower court in this case openly rejected that rule.

This clear-cut conflict, on a question which is of fundamental importance to the right to jury trial in criminal cases, calls for review by this court.

Furthermore, the District Court's interpretation of this court's mandate was that the hearing should be concerned only with the effect of the FBI agent's interview with juror Smith, and not with the Satterly-Smith and Curnow-Boyd communications. Thus, in connection with oral argument, Judge Goodman stated (Supp. R. 275) that this court's remand

incident discussed in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654."

*Remmer v. United States* (1955) 348 U.S. 904.

The Court of Appeals thereafter authorized the filing of concurrent supplemental briefs limited to the net worth issues. On petitioner's motion for permission to file *seriatim* briefs and to submit oral argument on the questions raised by the hearing on the extraneous jury contacts, the Court of Appeals enlarged the scope of the concurrent briefs to include the jury contact questions but declined to hear oral argument (Supp. R. 338-9). The judgment of the District Court was affirmed in a *per curiam* opinion dated May 23, 1955, which did not discuss any of the issues in the case (Supp. R. 341-2; Appendix A, *infra*, pp. i-iii).

This petition presents, therefore, substantially the same questions involved in the previous writ of *certiorari*, subject to these two qualifications: (1) The issues regarding the extraneous jury contacts are now presented in the light of a record showing what actually happened; and (2) the net worth issues in the case are limited to those which the lower court decided inconsistently with the principles laid down by this court in the *Holland* and related cases.

**A. Facts Relating to Extraneous Jury Contacts.**

There were four extraneous contacts with jurors. One was between jury foreman I. J. Smith and a James Satterly; a second was between Smith and the trial judge; the third was between Smith and FBI agent Callister;

> "was not for the purpose of considering whether or nor the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me."

Similarly, he stated that the Curnow-Boyd incident was not within the scope of the remand (Supp. R. 196). (Respondent's objection to the evidence showing that contact was also based on that ground. Supp. R. 195, 199.) While the court finally admitted the evidence, it repeated that this incident was not within the scope of the remand (Supp. R. 197) and indicated that it would be material only if directly related to the Smith-Satterly incident (Supp. R. 197-8).

This restricted view of the scope of the hearing is reflected in the fact that Judge Goodman's opinion (Supp. R. 33-39) is devoted almost completely to the FBI contact with Smith, in the constant reference in quotation marks throughout the opinion (six times in a seven-page opinion—Supp. R. 33, 34, 38, 39) to the phrase "the incident complained of" (with obvious reference to the FBI contact), and in the casual dismissal of the Smith-Satterly and the Curnow-Boyd incidents.

Moreover, the footnote which constitutes the only mention in the opinion of the Curnow-Boyd incident specifically declares (Supp. R. 36) that

> ". . . it had not the slightest bearing upon the subject matter of the hearing. . . ."

and the fourth was between juror Richard J. Carnow and a Deputy United States Marshal."

The fact that the first three contacts had occurred (but not the contents of the communications) first came to the attention of petitioner and his counsel from newspaper reporters the day after the return of the verdict, and his counsel thereupon filed a motion and supporting affidavit requesting a full hearing to develop all the facts regarding these contacts and any other improper communications which may have occurred. The fourth contact was not known to petitioner or his counsel until 1953.

The actual circumstances and content of these communications did not become known to petitioner or his counsel until June, 1954, when the hearing requested in February, 1952, was finally conducted pursuant to order of this court; and at that time the testimony suffered from the inevitable erosion of memory during the intervening two and a half years. As developed in the record, however, the following circumstances occurred.

On December 18, 1951, after the trial had been in progress approximately three weeks, jury foreman Smith was visited in his home one evening by James Satterly, who was a personal friend and an insurance client of Smith. Satterly discussed some changes in his automobile insurance policy and there was also talk about an accident he had had (Supp. R. 50). Satterly had worked as a crap-dealer in various gambling establishments in Reno, Nevada, and Smith knew that he was an ex-convict (Supp. R. 168). During the course of the discussion, Satterly

A reading of this court's opinion in ordering the hearing clearly shows that the purpose of the hearing was to develop all of the facts and circumstances relating to extraneous contacts with the jurors. The phrase "the incident complained of" which Judge Goodman's opinion quotes so frequently, was used in this court's opinion interchangeably with the plural word "incidents". And the reference to the effect of an FBI investigation of a juror's conduct was only by way of illustration, not of limitation of the scope of the hearing.

Finally, the evidence, which is uncontradicted in almost all significant respects, clearly does not support the conclusion that the presumption of prejudice was overcome. This is not the ordinary case of weighing the evidence. Rather, it presents a most serious question as to whether highly prejudicial statements to jurors can be dismissed as harmless, where no effort was made during the trial to point out the falsity of the statements or otherwise to neutralize them, and where the trial court and the prosecutors not only concealed the facts from the defendant but also took action which could only have emphasized to the juror the seriousness of the situation.

This court's prior opinion declares that "the burden rests *heavily* on the Government to establish .... that such contact with the juror was harmless." (347 U.S. at 229, emphasis added.) The evidence regarding the four extraneous contacts in this case shows that this burden was not carried.

1. *The Satterly-Smith contact.* This had two aspects:

(a) The false statement that Remmer had taken money "under the table" on the sale of Cal-Neva was

commented on Smith's status as a juror and made the following statement (Supp. R. 167):

> "I know Bones Remmer very well. He sold Cal-Neva for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—Why don't you make a deal with Bones?"

Smith noticeably raised his voice in replying that he was forbidden by the instructions of the judge to discuss the case (Supp. R. 128).

Two days later, on December 20, 1951, Smith reported this incident to Trial Judge Foley and quoted Satterly as having made the following statement (Supp. R. 134):

> "I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?"

After advising Smith that it sounded as though Satterly had been joking (Supp. R. 81, 134), Judge Foley held a meeting with Assistant United States Attorney Thompson and perhaps other members of the prosecution staff. At this meeting, it was decided to investigate the incident to see whether it had any connection with the defense, and it was also decided not to inform defense counsel in order not to frustrate the investigation (Supp. R. 135-7, 227-8).

Accordingly, on December 22, 1951, FBI agent Callister called on Smith and stated that he had been requested to conduct an investigation relating to Smith's talk with Satterly to determine whether an attempt had been made to exert any influence on Smith as a juror (Supp. R. 58, 152, 169-70). Callister made notes of what Satterly had

not discussed with Smith by either Judge Foley or the FBI agent. *And no inquiry was made at the hearing before Judge Goodman as to the impact of this remark on Smith*, since he was not recalled as a witness after the making of this remark became known at the hearing. The statement in Judge Goodman's opinion that this comment "in fact, under all the circumstances . . . was harmless" (Supp. R. 39) is made without benefit of any evidence whatsoever. There are no "circumstances" from which a finding of harmlessness could even remotely be inferred.

(b) The fact that Remmer had no connection with Satterly's suggestion of a bribe was never communicated to Smith during the trial. For all he knew, the Government was still investigating the incident—and in fact the decision to drop the investigation was not made until two weeks after the trial. Thus, realistically, Smith continued to serve as a juror with "the FBI . . . looking over his shoulder."

Would the Government have decided to drop this investigation if Remmer had been acquitted? Or would further investigation have then been made?

Far from showing that Smith put the whole thing out of his mind as a "joke", the evidence shows that he spoke of it as a possible "approach" to one of his fellow jurors on the way home immediately after the return of the verdict, and referred to it as a bribery suggestion in a discussion with an alternate juror a short time later (Supp. R. 184, 221). And he thanked another juror for participating with him in finding Remmer guilty and told

said to Smith and of Smith's relationship with and knowledge of Satterly, and of the fact that Satterly was moving to another state (Supp. R. 166-8).

On December 24, 1951, without having interviewed Satterly, FBI agent Callister reported to Assistant United States Attorney Thompson that there was nothing to indicate a connection between Satterly and the defense, and on Thompson's instructions he gave a similar report on January 4, 1952, to Judge Foley, who told him that "no further investigation was required at that time." (Supp. R. 157-8, 230, 233.)

Accordingly, the investigation was held in abeyance and no further work was done on it until approximately March 10, 1952, after petitioner had been convicted. At that time, in a meeting between Callister and Thompson, it was decided to terminate the investigation (Supp. R. 158, 230). No further information was conveyed to Smith at any time (Supp. R. 261). Thus, he was held in suspense throughout the trial as to the results of the investigation or whether it had been completed; and no effort was made to neutralize the effect of Satterly's false statements that he knew Remmer well and that Remmer had received "under the table" money on the sale of Cal-Neva. Nor was any inquiry made as to the impact on Smith of the "under the table" statement. On the contrary, the trial judge and the prosecutors were interested only in determining whether the defense had attempted to tamper with the jury (Supp. R. 137, 228).

And at the hearing in June, 1954, the fact that Satterly had made this statement regarding the Cal-Neva sale was not disclosed while Smith was on the witness stand;

and he was not recalled, after the development of this fact through Callister's testimony, for questioning as to the possible impact of this statement on him, nor was any effort made to inquire further into this phase of the matter. Judge Goodman made a finding that this remark about "under the table money" had been made (Supp. R. 34) but concluded, without any statement of his reasons or recital of facts upon which he relied, that the statement was harmless (Supp. R. 39).

On the way home from the court immediately after the verdict on February 22, 1952, Smith told juror Tinkham that it was possible he had been approached (Supp. R. 184), and he thanked juror Mack for finding Remmer guilty and said that someday he would tell her why he was so interested (Supp. R. 174, 177-8). Two weeks later, when he encountered alternate juror Morris, he related that he had been told during the trial that he could make a lot of money by stringing along with Remmer (Supp. R. 221).

In view of Satterly's statement to Smith that petitioner received $350,000 "under the table" on the sale of Cal-Neva, it is noted that petitioner's connection with Cal-Neva throughout the prosecution period was prominently mentioned in the trial (*e.g.*, Supp. R. 1593-6, 1903-17, 1925-35; 2218-21, 3027-36, 3073-4, 3114-16, 3602-6, 3612-13), and that his subsequent sale of Cal-Neva was also brought to the jury's attention a number of times (*e.g.*, Supp. R. 1930-3, 3029-36).

Satterly, incidentally, categorically denied at the hearing that the incident described by Smith had ever occurred, and his denial was corroborated by the testimony

of his wife, who was present during the conversation in which the incident occurred (Supp. R. 117, 125).

During the trial, probably in January, 1952, juror Curnow and Deputy United States Marshal Boyd had a conversation which led Curnow to believe that an attempt had been made to contact one of the jurors, and that the juror involved was probably Mrs. Mack. The details of this conversation are not clear, and Curnow's statements at various times regarding it are not entirely consistent.

On March 23, 1954, Curnow gave FBI agent McGee an affidavit (Ex. F, Supp. R. 210-11) reciting that during the trial Deputy Marshal Boyd asked him if he had heard of anyone on the jury being contacted, or had heard any discussion among the jurors indicating that a juror had been contacted; that he replied to Boyd in the negative; that at the time he thought Boyd's remark related to juror Mack, since he had seen her going into the Judge's chambers; and that later (it does not appear when) he learned that Mrs. Mack had been discussing an illness problem with the Judge.

Curnow told one of the defense attorneys in December, 1953, that an assistant marshal had asked him, about half way through the trial, if anyone had tried to approach him on the case and, when asked why he was inquiring, stated: "He tried to bribe one of the jurors." (R. 265.)

At the hearing in June, 1954, Curnow testified that one of the marshals asked him if he had heard any discussion by the jurors about anyone being approached; that he replied in the negative and asked why the question had been put to him; and that the marshal replied that he was

just curious (Supp. R. 200). He first testified that he did not know the name of the marshal (Supp. R. 203), but after his FBI affidavit was produced, he identified Boyd as the one who had talked to him, and conceded that he had known Boyd personally for several years (Supp. R. 208).

Boyd testified that he had known Curnow personally since 1948 and had participated with him in rifle and pistol shooting contests, but denied having had any such conversation with him (Supp. R. 249-252).

**B. Evidence Relating to Inspection and Production of Records Under Rules 16 and 17.**

The criminal indictment was filed on April 9, 1951 (R. 8). The case was set for trial on November 28, 1951 (R. 36). A motion for a bill of particulars was filed April 27, 1951, and denied June 15, 1951 (R. 10).

On November 9, 1951, petitioner noticed a motion for a continuance (R. 15-17), and on November 12, 1951, he noticed a motion (R. 17-20) for an order to inspect and take copies of certain books and records pursuant to the provisions of Rule 16, Federal Rules of Criminal Procedure. The records sought were described as "The books of account, journals, ledgers, cash books, expense books, vouchers and other records maintained by, or pertaining to the income and expense of," several named enterprises and any others from which the Government contends petitioner received income as an owner during the years 1944, 1945 and 1946.

Supporting affidavits were filed with the motions (R. 20-34). They recited that in 1949 the Government had

placed liens against petitioner's funds; that a certified public accountant who had assisted the petitioner prior to the indictment had withdrawn in 1950 because of petitioner's inability to compensate him for his services (R. 49); that petitioner's tax counsel had become associated with the case in March, 1951; that in September, 1951, a certified public accountant had finally been engaged; that on October 22, 1951, petitioner's counsel requested Government counsel to afford petitioner's accountant access to the records; that Government counsel first indicated that such inspection would be permitted if petitioner's counsel submitted a written statement of the businesses in which petitioner had an interest; that such written statement was submitted on October 23, 1951, and the request was pursued diligently until November 7, 1951, at which time petitioner's counsel received a letter from Government counsel advising that such inspection would be permitted only if petitioner first submitted the written consent of the third parties from whom the Government had obtained the records; that Government counsel refused to give petitioner's counsel the names of such third parties;[3] and that the records covered by the motion were material to the preparation of the defense.

The Government filed an affidavit in opposition (R. 35-41). This affidavit recited that certain records had been

[3]At the trial, it was developed that the agents obtained these records principally from two of petitioner's partners (Maundrell and Kyne) and two accountants (Ayton and Slater) (R. 2563-6). Both of the latter were deceased, and one of the partners (Maundrell) was in Honolulu at the time the "written consent" condition was imposed (R. 1394, 1559, 1593-7, 1765-6).

procured by the Government from third parties; that prior to the indictment certain of the records had been turned over to an accountant for his use in behalf of the petitioner; that the accountant had turned them over to one of the petitioner's attorneys who continued to hold them and that the accountant had been unable to return them to the Government in accordance with his agreement. These latter records were subsequently deposited with the clerk of the court, pursuant to an order of the trial judge, and made available to both parties during the trial (R. 928-929, 1151). Petitioner's motion covered a considerable quantity of original records such as adding machine tapes, bank statements, cancelled checks, dealers' daily reports, etc. (R. 48). These were never made available to petitioner during the trial (R. 2717, 2771, 3250), although they were actually in the court house (R. 2451, 3483-6).

Both of petitioner's motions were heard and denied on November 15, 1951 (R. 42, 3492). No error was assigned as to the denial of a continuance. The Court of Appeals upheld the denial of the motion to inspect on the grounds that prior opportunities which had been afforded petitioner's representatives to examine the material were sufficient (R. 3755), that the motion was not timely (R. 3756), and that no specific showing of prejudice had been made (R. 3758).

Pursuant to Rule 17 of the Federal Rules of Criminal Procedure, petitioner filed a motion on November 23, 1951, together with supporting affidavits filed November 26, 1951, and procured a subpoena (R. 46-7) for production and inspection of books, papers, documents and ob-

jects (R. 42-54). The prosecution filed a motion to quash the subpoena, based upon the earlier affidavit (R. 55-58). The petitioner's motion was denied and the motion of the prosecution was granted (R. 58). The Court of Appeals sanctioned the denial of petitioner's motion and the quashing of the subpoena because of the circumstances discussed in connection with the motions under Rule 16 (R. 3757). The Court of Appeals did not hold that compliance with the subpoena would have hampered the Government in any way, nor did the Government offer any evidence to that effect, either by affidavit or during the hearing on the motion.

**C. Evidence Relating to Net Worth Issues.**

The allegation of unreported income in this case rests entirely on net worth computations. There is no evidence that any particular transactions or categories of income were not reported.

**1. Starting Net Worth.**

The uncontradicted prosecution testimony shows that there was always cash in the safe deposit box in amounts —"sometimes . . . considerable and sometimes less"— which "varied every day" (R. 1536). The prosecution also showed on direct examination of one of its own witnesses that a specific check in the amount of $17,739.50 was cashed and the proceeds placed in the box on December 3, 1943, just 28 days before the starting point (R. 1483-5, 1539). There was no evidence that any such sum of money was removed by December 31, 1943, or that the box was substantially empty at that time. The prosecution's net worth exhibit shows a question mark, rather

than either a zero or some other figure, as the amount of "cash in Safe Deposit Boxes" (Ex. 183, item 25, R. 3613).

A judgment of $1,800 obtained against appellant by one Monahan in 1938 was not paid until 1945. However, by the prosecution's own computations appellant had a minimum net worth on December 31, 1943, of $141,837.42 (R. 3613) including $8,425.51 in three bank accounts (R. 3589, 3601); and there was no evidence from which it could reasonably be inferred that the nonpayment of this small judgment was due to lack of funds.

The evidence showed that petitioner had been one of the owners of Cal-Neva lodge since 1924 or 1926 (R. 1903). There was no showing as to what other interests he had then, or earlier or later, nor was there any evidence of a destitute financial history prior to the indictment period. And no attempt was made to establish a net worth at some prior time and bring it up to date through proof of his reported income or financial history during the intervening years.

Appellant offered proof that he had an additional asset of $10,000 at the starting point. This was the testimony of James Jeffress that in 1944 his father, Robert, who was deceased at the time of the trial, told him that he still owed appellant $10,000 which he had borrowed from appellant in 1943 (R. 3204-5). The offer of proof, based on the "Declarations Against Interest" exception to the Hearsay rule, was objected to on the ground that it was hearsay and was not the primary evidence of the transaction, and the objection was sustained (R. 3207-8). The record does not, therefore, include any proof of this asset.

is of itself a compelling showing of materiality. The mere bulk of the records maintained would be pertinent to show the efforts made to report the income accurately. If cash register tapes and dealers' reports substantiated the gross receipts shown on the return—a fact which petitioner could not determine without accounting analysis—that fact could have materially influenced the jury. This mass of documents undoubtedly contained a myriad of clues which might have been helpful to the defense. It might, for example, have included the written record of money placed in the safe deposit box which Kyne said he turned over to Slater and which was in Slater's possession when Kyne last saw it (R. 1559). Special Agent Weaver testified that, so far as he knew, he had obtained all of the records in Slater's possession (R. 2566).

The denial of petitioner's pre-trial motions, the quashing of the subpoena, and the summary denial of his further request during the trial for an opportunity to examine these records (R. 928-9), all left him on the wrong side of an opaque screen placed around his own records. The Government was permitted to reach behind this screen and produce what it wanted, but petitioner was told that he could not even examine any of this material unless he first pointed to the particular document he wanted and showed its specific materiality.

This requirement of X-ray vision is completely contrary to the purpose and policy of Rules 16 and 17. Those rules are based on a "more liberal policy" than theretofore existed and afford "discovery as to documents and other materials otherwise beyond the reach of the defendant which, as in the instant case, might be

2. Inclusion of "Accounts Receivable" in 1945 Closing Net Worth.

The prosecution's net worth computation at the end of 1945 includes an asset value of $23,293.99 for the B-R Smoke Shoppe (Ex. 183, R. 3612, line 2). This is made up principally of an item designated in Ex. 169 (R. 3601) as "Cash on Hand—Bankroll—Pritchett's testimony . . . 20,000.00". There is no testimony, by Pritchett or anyone else, of the existence of any such cash. On the contrary, when Pritchett was asked as to the amount of cash at the end of 1945, he stated that it was "around five thousand dollars cash" (R. 1949). In response to a further question regarding accounts receivable, he testified there was "around 15 thousand outstanding" (R. 1949). The evidence showed that the B-R Smoke Shoppe permitted some of its customers to bet on credit, and if they lost entered their losses in the book as "markers" until they were paid (R. 1360-61).

The removal of this $15,000 in "accounts receivable" from the 1945 closing net worth would completely eliminate the claimed deficiency for 1945, since the prosecution alleged an understatement of income of only $11,747.04 (Ex. 183, R. 3613).

3. Evidence of Willfulness.

As previously stated, there is no evidence that any transaction or any type of income-producing activity was concealed on the tax returns. The understatement of net income in this case is based on net worth computations which do not specify the source or nature of the alleged understatement. Analysis of the prosecution's computations shows, however, that the understatement consists

numerous and difficult to identify." *Bowman Dairy Company v. United States*, 341 U.S. at 218-20.

The Court of Appeals did not attempt to reconcile its holding with the basic policy statements expressed by this court in the *Bowman Dairy* case, but rather distinguished that case solely on the ground that the specific holding in *Bowman Dairy* dealt with the validity of an order directing the production of records, rather than an order denying a motion to produce.[7]

The refusal of the lower courts to follow the *Bowman Dairy* opinion, and the square conflict with the *Fryer* case, in which the Government's petition for *certiorari* was denied, call for review by this court. See also *Gordon v. United States* (1953) 344 U.S. 414, where the denial of a request for inspection of evidentiary material in the Government's possession was held reversible error even independently of specific provisions such as Rules 16 and 17.

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**C. THE LOWER COURT'S DECISION ON THE NET WORTH ISSUES IS CONTRARY TO THE PRINCIPLES ANNOUNCED BY THIS COURT IN THE HOLLAND AND RELATED CASES.**

**1. The Starting Point Was Not Established.**

This is not a case in which the existence of cash at the starting point is just a theoretical possibility, or is based on the self-serving claim of the defendant. On the contrary, the prosecution's own evidence shows that there

[7]The trial court, in denying the motion under Rule 17, expressed doubt that the Supreme Court was serious in approving the portion of the subpoena and order involved in the *Bowman Dairy* case which called for production of "all documents, papers and objects" (R. 287).

of two things: (a) technical-type accounting adjustments, and (b) non-recognition of partnerships.

The total understatement of net income alleged in Exhibit 183 (R. 3612-13) for 1944 and 1945 is $43,494.95. Of this, $21,669.49 represents the capitalization, by the Government agents, of repairs, improvements, and excise taxes which they felt should, as a matter of proper accounting, be capitalized or added to inventory rather than be deducted as current expenses, as the following summary shows:

| | 1944 | 1945 |
|---|---|---|
| Improvements at Menlo Club capitalized (See Ex. 165; R. 3597) | | $ 920.00 |
| Improvements at Mason Street capitalized (See Ex. 174; R. 3607) | | 7,489.76 |
| Office safe capitalized (See Ex. 174; R. 3608) | $ 425.00 | — |
| Liquor tax added to cost of liquor (See Ex. 175; R. 3609) | 8,397.53[1] | |
| San Diego Social Club Expenses capitalized (R. 1268) appellant's half | | 4,437.20 |
| | $8,822.53 | $12,846.96 |

Another, $15,000 represents the accrual of the B-R Smoke Shoppe accounts receivable at the end of 1945, and the inclusion of this sum turns on whether accrual rather than cash accounting principles should be applied.

Thus, all but $7,000 of the total "understatement" of income consists, in reality, of these accounting-type adjust-

[1] Although the jury was instructed that the taxpayer had the option of either treating this tax as a deductible expense or adding it to the cost of the liquor (R. 145), it permitted the prosecution to include it in the net worth computations as a part of petitioner's investment in the liquor, notwithstanding petitioner's objection that it should be treated as a currently deductible item (R. 518).

ments. The remaining $7,000 is attributable to the non-recognition of the partnerships; and even that issue is immaterial since the existence of $7,000 or more in starting point cash was not foreclosed by the evidence.

The prosecution considered the total investment in various enterprises as the sole property of appellant. Its net worth computations, therefore, ignore the capital accounts, or equities, of the various partners who actually conducted those businesses, with the result that appellant is charged in this case with the income allocated to the respective partners on the tax returns and reported in their own tax returns. In essence, the basic partnership arrangement in each of these enterprises was as follows: (a) appellant arranged the purchases of the business and obligated himself to pay the full balance due; (b) appellant arranged with the partners for them to conduct the actual business, and agreed that (in addition to a weekly wage for working on the premises) each should have a specified percentage interest in the net profits, to be accumulated in the business until it equalled his proportionate share of the capital investment; (c) appellant was not personally active in any of the businesses except on matters of policy, and even there the management functions were performed principally by Kyne and Maundrell; (d) partnership returns were filed regularly, showing the amount of income allocable to appellant and to each of the other partners; (e) the equities of the various partners were reflected in the books, except in the B-R Smoke Shoppe, where the profits were distributed equally each year.

There was no evidence that the partnerships were fictitious or sham, or that the partners were "dummies" or

ible" net worth computed by the Government), there would be no basis whatsoever for claiming even inferentially that any gross receipts were omitted.

The evidence clearly does not foreclose "with reasonable certainty" that petitioner did not have $7,000 or more in cash at the starting point.

The decision here is contrary to *Costello v. United States* (CA 2, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9342, where the Second Circuit held that the jury was not justified in inferring that the defendant did not have as much as $40,000 cash at the starting point, despite a prior financial history showing long delinquencies in the payment of substantial obligations.

The decision of the lower court also conflicts with the Fifth Circuit's recent holding in *Vloutis v. United States* (CA 5, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9262, where, as here, the evidence showed that there was cash in some undetermined amount in a safe deposit box at the starting point. The Government's assumption in its net worth computations that there was no cash was held reversible error.

Furthermore, the refusal to permit petitioner to examine and use his own records violates the basic requirement, as set forth in the *Holland* opinion, that in a net worth case the Government must make a fair disclosure of what it finds.

Finally, the starting point lacks a solid foundation because of the exclusion of petitioner's proffered proof of the additional $10,000 owed to him by Jeffress at the starting point. This violates the *Holland* requirement

of full development of the starting point evidence. Respondent has abandoned its objection at the trial that this was hearsay and not the primary evidence (R. 3207-8), as well it must under the authorities. See 5 *Wigmore on Evidence* (3rd Ed.), Secs. 1420-22, 1456. The evidence was clearly admissible as a declaration against interest.

The Court of Appeals sought to justify this ruling solely on the ground that this evidence was offered in conjunction with other evidence relating to a 1946 loan, and was not separately stated. But there is no validity in this attempted justification of an obviously erroneous ruling. The fact that this evidence of the $10,000 loan was offered in an offer of proof which also included a declaration against interest of the same deceased as to the time of repayment of the $50,000 which he loaned to appellant on September 27, 1946 (evidenced by th note in evidence as Ex. A-1; see testimony at R. 1843-4) is of no significance. Each item was tated separately (R. 3204-5, 3206). Both were admissible under a recognized exception to the hearsay rule. The 1946 item is immaterial on this appeal only because the jury disagreed for that year.

Since this evidence went directly to the correctness of the prosecution's opening net worth, its exclusion was, in view of the large amount, highly prejudicial.

**2. There Was an Improper Accrual of "Accounts Receivable" in the 1945 Closing Net Worth**

As stated above, the prosecution's net worth as of the end of 1945 includes $15,000 in accounts receivable, or unpaid bets, of the B-R Smoke Shoppe. The impor-

tance of this item is clear from the fact that without it there would be no tax deficiency for the year 1945. The evidence is uncontradicted that these markers represented unpaid bets of patrons of the B-R Smoke Shoppe who were permitted to bet on credit. These markers, therefore, are in the same category as charge account sales made by a merchant, and on the cash basis of accounting they are not taxable as income until actually paid. There is no contention in this case that either the petitioner individually or the B-R Smoke Shoppe was on the accrual rather than the cash basis, nor do the facts warrant any such conclusion. Rather than face this issue of cash versus accrual accounting, the prosecution sought to disguise the true nature of this $15,000 in markers by lumping it into the total figure of $20,000 described in Exhibit No. 169 (R. 3601) as "cash on hand—bankroll—Pritchett's testimony." Pritchett's testimony makes it clear, however, that there was only $5,000 in cash at the end of 1945, and that in addition there were "accounts receivable" of approximately $15,000 (R. 1949). Petitioner made a timely objection to the inclusion of this amount in Exhibit No. 169 (R. 2499), to the introduction of Exhibit No. 169 with this item in it (R. 2500), and to the carrying forward of this figure into the overall net worth exhibit, No. 183 (R. 2856, 515, 516).

The Court of Appeals held (R. 3769) that these accounts receivable were properly included in the closing net worth "regardless of whether such markers should technically be treated as cash or accounts receivable", because they were collectible as a practical matter even

if not legally valid obligations. This, of course, misconceives the issue, which is whether the distinction between cash and accrual accounting may be ignored in computing income on the net-worth method.

In holding that Section 41 of the Internal Revenue Code of 1939 (which generally requires the Commissioner of Internal Revenue to use the same method of accounting as is reflected in the taxpayer's books) does not limit the use of the net worth method to situations in which the taxpayer has no books or where his books are inadequate, the *Holland* opinion specifically declares that Section 41 "refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years." *Holland v. United States*, 348 U.S. at 131.

It is clear, therefore, that the trial court violated Section 41 when it permitted the prosecution to ignore this fundamental distinction between the cash and the accrual methods of accounting. This point is sufficient without more to require a reversal as to the third and fourth counts of the indictment, which relate to the year 1945, since it completely eliminates any deficiency for that year.

Since the record also includes reference to "markers" of the Menlo Club and the 186 Club, and respondent has previously used testimony as to them in justification of the inclusion of the B-R accounts receivable in the 1945 closing net worth (see Br. for U. S., pp. 68-71, *Remmer v. United States*, No. 304, October Term, 1953), we point out that the B-R Smoke Shoppe "markers" were of a substantially different nature. Both the Menlo

Club and the 186 Club were card clubs, where the patrons paid an hourly charge to the house for the privilege of playing cards with other patrons. The patrons did not bet against the house, although they did bet against each other. Occasionally, the house loaned money to a player, and carried the loan as a "marker". The inclusion of these markers, representing loans, in the assets of the Menlo Club and the 186 Club is not challenged by petitioner.

The B-R Smoke Shoppe, however, was a book-making establishment where patrons placed bets against the house on horse races. Some patrons of this business were permitted to bet on credit, and when they lost their obligations were carried on the books as "accounts receivable", or "markers", until paid (R. 1360-1). The inclusion of these amounts in petitioner's closing net worth is clearly erroneous.

Nor is there any basis for the contention (see Br. for U.S., pp. 69-70, *Remmer v. United States*, No. 304, October Term, 1953) that this $15,000 consisted of markers of the partners representing withdrawals made by them during the year. There is no evidence that any such withdrawals had been made in 1945, and no basis for inferring that any part of this $15,000 in "accounts receivable" represented partners' drawings.

**3. The Charge to the Jury Did Not Conform With the Requirements Outlined in the Holland Case.**

The *Holland* opinion emphasizes the importance of clear and comprehensive instructions in net worth cases.

> "Charges should be especially clear, including, in addition to the formal instructions, a summary of the

> nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused."
>
> *Holland v. United States*, 348 U.S. at 129.

This is to be read in conjunction with the basic principles set out in the opinion, including the Government's obligation to make a full and fair disclosure of the results of its investigation.

The charge in this case was incorrect and inadequate in several respects.

**a. The Net Worth Method Was Not Properly Explained.**

Unlike the *Holland* case, the court in this case gave only a very sketchy statement of the net worth method. There was no "summary of the nature of the net worth method," no statement of "the assumptions on which it rests," and no mention of any "inference available . . . for the accused."

The net worth method is mentioned only in Instructions 14 and 15 (R. 136-8), which are set forth in Appendix E (*infra*, pp. viii-ix) in their entirety.

Insofar as relevant here, these instructions stated only that (1) a defendant's net worth at a given time is the difference between all of his assets and all of his liabilities, (2) an increase in a man's net worth during the year justifies the inference of taxable income if it is shown that he did not get it by gift or inheritance, and (3) non-deductible expenditures should be added to increase in net worth in arriving at taxable income.

Nothing was said about the evidence necessary to establish the starting net worth nor about the prosecution's

her that some day he would tell her why he was so interested (Supp. R. 174, 177-8).

And Judge Goodman's conclusion that Smith regarding Satterly's statement "as being jocular" (Supp. R. 35) is further belied by what Smith told the FBI agent, whose notes made at the time quote the substance of Smith's statements as follows (Supp. R. 167):

> "Felt that Satterly was feeling him out . . . Don't believe he has been in contact with Remmer, but believe he would have made arrangements if reception had been cordial. . ."

In addition, Smith told the FBI agent that Remmer had watched Smith enter the judge's chambers at the time he reported the incident (Supp. R. 167)—an observation which further reveals Smith's thoughts as to Remmer's possible connection with Satterly.

2. *The Smith-Judge Foley Contact.* While nothing was said during this conversation which of itself was derogatory to petitioner, it has significance on the question of the impact of Satterly's remarks. The fact that Smith, after two days of anxious deliberation, decided to report a remark made by a man who was a personal friend as well as a business client, shows that Smith did not consider the remark a joke but thought at least as a serious possibility, that he had received a feeler for a bribe. And Smith reported this to Judge Foley, even though Satterly "did not persist", although Smith was aware of Judge Foley's admonition that communications should be reported to him if the communicator *persisted* in discussing the case after being advised that the juror was not free to discuss it (Supp. R. 53-4).

burden of proof in that respect. Nothing was said about the assumptions inherent in the method, or the circumstantial nature of the case, or the fact that the method is "at best an approximation."

And in spite of the vital importance of the item of cash at the starting point, as evidenced both by the uncontradicted prosecution testimony and the "question mark" designation after the cash item on the prosecution's net worth statement, the jury was not told one word about the significance of this item or the burden of proof respecting it.

Petitioner requested (but was refused) instructions which explained the net worth method in understandable form, pointed out the critical importance of accuracy at the starting point, and stated that the burden of proof on this issue was on the Government rather than the defendant. See Requested Instructions 108, 109, and 114 (R. 79-85). Proper exception was taken to the failure to give these instructions (R. 3493-6).

The jury was thus left without any real notion of how to apply the net worth method to a complex factual case. The fact that the prosecution was permitted (over objection) to introduce its net worth statement with a question mark denoting the amount of cash implied to the jury that it could properly ignore the cash item unless the defendant came forward with proof of the amount.

The Supreme Court's admonition in the *Holland* case that "bare figures have a way of acquiring an existence of their own," and its warning of the "great danger" that once the Government establishes the figures in its

3. *The Smith-FBI contact.* This must surely have impressed upon Smith the seriousness of the incident. The FBI agent did nothing, then or later, to refute the implication that Remmer had been behind the bribe offer. On the contrary, the absence of any advice from the Government that Remmer was not involved could only have made Smith wonder even more whether Remmer was in fact responsible for Satterly's suggestion.

Judge Goodman based his decision in part on the conclusion that the purpose of the FBI investigation was to determine whether *Satterly* had committed an offense, and not to investigate *Smith* "as to his conduct, as was conjectured in the opinion of the Supreme Court" (Supp. R. 37). This, again, misconstrues this court's opinion, for the opinion shows that the vice of the whole situation lies in the impression which the juror might get from the fact that a conversation to which he was a party is being investigated. Not knowing what Satterly might have told the FBI, Smith might well be under subconscious (if not conscious) pressure to avoid any suspicion by advocating a guilty verdict.

Smith knew that Satterly was an ex-convict (he informed the FBI agent of this—Supp. R. 168), and that he was then thinking of buying a gambling establishment in Idaho (where gambling is illegal). It would have been natural for Smith to wonder whether Satterly might contradict Smith's statement of the conversation (which, in fact, Satterly did do at the hearing by denying that it had ever occurred) and might try to protect himself by claiming that Smith was the one who suggested a "deal". The fact that a conviction would remove any possible

net worth computations "the jury may assume that . . . the crime of tax evasion automatically follows," are particularly appropriate here. And the possibility of this was increased, to use the Supreme Court's terminology, by the absence of "guarding instructions".

**b. The Instructions on Willfulness Were Not Correct.**

The *Holland* opinion declares that willfulness "cannot be inferred from the mere understatement of income" but "must be proven by independent evidence." 348 U.S. at 139.

As we have pointed out above, the great bulk of the deficiency in this case stems from the disallowance by the revenue agents of expense deductions which they felt should be capitalized. It is clear from the record that the decision to treat these as current rather than capital expenditures in the returns was made by the bookkeepers rather than by appellant, and we hardly need add that even the courts have not been able to fix a sharp line between what is deductible as current expense and what must be capitalized as a part of the permanent investment.

In this situation, however, the question of intent was critical. It was equally crucial on whether the partnerships which the prosecution disregarded were fraudulent in a criminal sense, as distinguished from a case of non-recognition for civil tax purposes.

The court refused to give any of appellant's requested instructions on willfulness. The sole explanation of the term "willful" is found in Instruction No. 19 and reads as follows (R. 140):

suspicion could not have escaped him if he thought about the matter at all—as he obviously did.

4. *The Curnow-Boyd incident.* We have already discussed Judge Goodman's belief that this was outside the scope of the hearing. We add at this point that there is no factual basis for considering the incident harmless. The prejudicial effect of a statement to a juror, by a deputy marshal who is also a personal friend, that an attempt had been made to reach one of the jurors, is too obvious to need elaboration. Even if an effort had been made to overcome this prejudicial effect by a full hearing during the trial, it is doubtful if the prejudice could have been overcome. See, for example, the *Stone* case, *supra*, where the conviction was reversed even though the trial judge immediately notified the defense and did everything in his power to neutralize the prejudicial effect of the attempted approach.

But here, there was no neutralization of the remark, and it remained with the juror untarnished by any correction or retraction. Can it be said that the juror was not impressed in the least with this piece of misinformation?

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**B. THE DENIAL OF PETITIONER'S EFFORTS TO INSPECT AND USE HIS OWN BUSINESS RECORDS IN THE GOVERNMENT'S POSSESSION DEPRIVED HIM OF A FAIR TRIAL.**

The denial of petitioner's motions for inspection under Rules 16 and 17, and the quashing of the subpoena for the production of the documents, put petitioner in the incredible position of not being able to use the records of his own businesses in preparing and presenting his defense.

*Instruction No. 19*

"The word 'wilful' when used in a criminal statute generally means an act done with a bad purpose, but the word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by disregard whether one has the right so to act."[8]

The failure to give any of the requested instructions on willfulness (to which proper exception was taken under Rule 30, R. 3493-6) left the jury with wholly inadequate instructions on this vital issue.

Defendant's Requested Instructions 69, 75, 77, 79, 80, 81, 82, 88, 89 and 90 (R. 73-9) deal with the question of willfulness both in its general sense in tax cases and as involved in the factual content of this case. The substance of these instructions should have been stated to the jury. In order to show the pertinency and correctness of these requests, we summarize and comment on them as follows:

Request No. 69 (R. 73-4) defines willfulness as used in Section 145(b), in accordance with the language of *Spies v. United States* (1943) 317 U.S. 492, 499.

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[8]The giving of a substantially identical instruction was held to be such plain and fundamental error as to require reversal even though no exception was taken to it, in *Bloch v. United States* (CA 9, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9364 (petition for rehearing pending). Although that decision, which was rendered by another panel of judges of the same circuit, was called to the attention of the panel which decided this case, no mention is made of it in the opinion, which, as already noted, was simply a *per curiam* statement that the judgment should be affirmed. Still another panel of the Ninth Circuit distinguished another holding of the *Bloch* case by emphasizing the instruction quoted above as rendering the charge as a whole erroneous. *Legatos v. United States* (CA 9, 1955) ___ F. 2d ___, 55-1 U.S.T.C. Par. 9443.

The decision of the court below is contrary to the views expressed by this court in *Bowman Dairy Company v. United States* (1951) 341 U.S. 214, as to the purpose and policy of Rules 16 and 17.

The lower court's decision is also in conflict with the decision of another circuit in *Fryer v. United States* (CA D.C., 1953) 207 F. 2d 134; *cert. den., United States v. Fryer* (1953) 346 U.S. 885, petition for rehearing *denied*, 346 U.S. 928.

It is conceded that the documentary materials which petitioner sought to examine and to have produced were evidentiary in character and within the scope of Rules 16 and 17. The Court of Appeals justified the denial of petitioner's motions on these grounds (R. 3754-8): (a) Petitioner's accountants were free to examine these records *before* the indictment; (b) the motions were not timely; and (c) no *specific* showing of prejudice has been made.

None of these reasons justifies the denial of the motions. The pre-indictment inspection afforded to petitioner's representatives was for two purposes: (1) Initially, it was only to prepare Tax Court petitions contesting the jeopardy assessments made in 1949; (2) later, it was to determine the cost to petitioner of a comprehensive accounting analysis for use in conferences with the Bureau of Internal Revenue—an analysis which was never made because the tax liens previously filed against petitioner had made it impossible to pay the substantial accounting fees required for such an analysis. The issues in a criminal case are obviously different from those in a civil proceeding, particularly where (as here) the civil assess-

Request No. 75 (R. 74) distinguishes between the concealment of facts, on the one hand, and, on the other hand, the making of an erroneous or untenable claim based on facts which are not concealed. This is pertinent to the issue of willfulness as applied to the partnerships and to the technical adjustments.

Requests Nos. 77 and 78 (R. 74-75) point out the difference between corrupt intent and honest error. Requests Nos. 82 and 88 (R. 78) are similar in substance.

Requests Nos. 79 and 80 (R. 75-6) state that the specific intent to defraud the United States of taxes must be proved beyond a reasonable doubt.

Requests Nos. 81 and 89 (R. 77-8) state that, to convict, the jury must find that the prohibited acts were "done purposely in bad faith with an intent to evade tax," that "the gist of the offense is an act done with a bad purpose without justifiable excuse," and that "good faith will entitle such defendant to an acquittal."

**c. The Court Erroneously Refused to Charge on the Inferences Which Might Be Drawn From the Prosecution's Failure to Produce Books and Records in Its Possession.**

One of the basic principles which underlies the *Holland* opinion is that in a net worth case the Government must make a reasonably full investigation and a fair disclosure of what it finds. This is because the burden of proof remains on the Government, because a taxpayer "may be entirely honest and yet unable to recount his financial history," and because the Government's "duty is not to convict but to see that justice is done."

While the discussion of this requirement in the *Holland* case is related to the specific question of the Government's

ments are not based on the net worth method used in the criminal case. If inspection for the limited purpose of preparing pleadings in a civil case is recognized as proper, it is all the more important to permit a defendant to examine his records to prepare for criminal charges subsequently filed against him.

Nor were the motions made out of time. Rule 16 authorizes a motion to inspect and take copies "at any time after the filing of the indictment", and Rule 17(c) provides for a motion to produce subpoenaed documents for advance inspection "at any time prior to trial or prior to the time when they are to be offered in evidence."

The formal motion under Rule 16 was made here two weeks before the trial. It was preceded three weeks earlier by a request of Government counsel to permit inspection—a request which was refused by the Government after a delay of two weeks despite an initial assurance that it would be granted (R. 27). Petitioner could not realistically make the request at an earlier date because, as a result of the tax liens, he had not been able to secure the services of an accountant to make the analysis.[5] The request was made promptly after an accountant was obtained, well in advance of the trial. Nowhere in the record is there any showing that such inspection would have prejudiced the Government in the preparation of its case. On the contrary, the Government's opposition seems to have been based on pique resulting from the fact that, at the time of the grand jury hearing,

[5]His earlier efforts to obtain the release of a portion of his frozen funds for this purpose had been rejected by the Government despite his offer to post a surety bond (R. 50-54).

duty to run down leads furnished by the taxpayer, the court obviously had in mind a basic proposition which is equally applicable to the instant situation. The books and records of the businesses in which petitioner had an interest were obviously pertinent and material. A great mass of such records were turned over to the revenue agents in 1946, 1947, and 1948 and admittedly have been in the Government's possession ever since then. Petitioner's requests to examine them before the trial and to have them produced at the trial were refused by the court.

The Government agents testified that the books and records were incomplete and inadequate (R. 2564, 2869), and the *Holland* opinion points out that an intent to evade may be inferred from incomplete records.

The court should, therefore, have given Requested Instruction No. 129 (R. 87), to the effect that the jury might properly infer, from the prosecution's failure to produce the records in its possession, that their production would be beneficial to petitioner.

Thus, apart from the error in permitting the prosecution to make a wholly unilateral and extrajudicial determination of what records were material, there was a failure to instruct the jury on "the inferences available both for and against the accused," as required by the *Holland* decision.

The failure to give these various instructions cannot be considered harmless. They go to critical issues. They represent the safeguards which the Supreme Court has deemed essential in view of what it described as the "pitfalls inherent in the net worth method."

one of petitioner's attorneys had refused to turn over a portion of petitioner's records for use before the grand jury (R. 39-41).[6]

The unreasonableness of the lower court's statement that no *specific* showing of prejudice was made by petitioner is emphasized by the fact that the records were voluminous (occupying one packing box of 50 cubic feet capacity and several smaller cartons—R. 48), that they had been in the possession of the Government continuously since taken from the various business premises by various revenue agents during the period 1946-48, and that petitioner personally had never had anything to do with the bookkeeping or with the supervision and maintenance of records. Moreover, the two public accountants who had set up and supervised the records had both died before the trial (R. 1394, 1559). How could any *specific* showing of the importance of some *particular* document possibly have been made under these circumstances, in advance of any inspection?

The fact that the documents were business records of the enterprises from which petitioner derived his income

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[6]The record shows that the documents in question were turned over to petitioner's accountant Semenza, in 1949, for use in preparation of the Tax Court petitions, and were subsequently turned over to petitioner's attorney Golden, who was on two weeks' active duty, as a reserve army officer, at the time. Petitioner's attorney Avakian, who had just entered the case as tax counsel, refused to take these records from Golden's office for use before the grand jury without first consulting Golden unless Government counsel stated the contents and significance of the records so as to enable petitioner's attorney, who was himself unfamiliar with the records, to exercise an intelligent judgment; but Government counsel declined to do so (R. 168-177). All of these records were deposited in court by petitioner's counsel during the trial for the Government's use, pursuant to court order (R. 928-9, 1151).

## VII. CONCLUSION.

For the foregoing reasons, the court should again issue a writ of *certiorari*, so that the serious questions arising from the clandestine jury contacts and the other important questions which the court did not previously find it necessary to decide may now be determined, and so that the conflicts between the decision of the lower court and the decisions of this court and of the Courts of Appeals in other circuits may be resolved.

Respectfully submitted,

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
*Attorneys for Petitioner.*

LOHSE AND FRY,
*Of Counsel.*

June, 1955

**(Appendices A, B, C, D and E Follow.)**

## Appendix A

### OPINION BELOW.

*In the United States Court of Appeals for the Ninth Circuit*

| | |
|---|---|
| ELMER F. REMMER, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.* | No. 13,281 May 23, 1955 |

Appeal from the United States District Court for the District of Nevada.

Before MATHEWS, STEPHENS and ORR, Circuit Judges.

PER CURIAM.

In this case, a judgment of the District Court was affirmed by us on May 28, 1953.[1] The Supreme Court granted certiorari[2] and on March 8, 1954, vacated our decision and remanded the case to the District Court[3] with directions to hold a hearing to determine whether an incident which occurred during the trial and was re-

[1]Remmer v. United States, 9 Cir., 205 F. 2d 277.
[2]Id., 346 U.S. 884.
[3]Id., 347 U.S. 227.

was cash in some undetermined amount and that just 28 days before the starting point one specific sum of over $17,000 was placed in the safe deposit box. The Government itself recognizes the existence of a cash fund by inserting a question mark, rather than a zero, for the item of "cash in safe deposit boxes" in its net worth exhibit (Ex. 183, R. 3613).

In computing the income on the net worth method, however, the Government's computations ignored the item of cash, which had the effect of treating the amount of cash as zero. Thus, in effect, the Government's position was this: "We know there was cash in some amount, but it is up to the defendant to prove how much; and if he doesn't prove the amount we are entitled to ignore the cash completely."

This is contrary to the basic proposition laid down in *Holland v. United States* (1954) 348 U.S. 121, that the Government has the burden of establishing the opening net worth with reasonable certainty.

Unlike the *Holland* case and *Friedberg v. United States* (1954) 348 U.S. 142, there is no evidence here of a previously impoverished financial history to support an inference that there was no cash. Rather, there is not even as much background as the Government's showing which this Court held insufficient in *United States v. Calderon* (1954) 348 U.S. 160. And unlike *Calderon* and *Smith v. United States* (1954) 348 U.S. 147, there are no extrajudicial statements or admissions upon which the Government can rely here.

Nor does the long nonpayment of the $1,800 Monohan judgment (from 1939 to 1945) support any inference that

petitioner had no cash, since the Government's own computations credit petitioner with cash of $8,425.51 in three bank accounts as a part of his net worth of $141,837.12 on December 31, 1943 (R. 3589, 3601, 3613).

And unlike the *Holland*, *Friedberg*, *Calderon* and *Smith* cases, where the amount of starting point cash necessary to overcome the deficiency computations ranged from $46,000 to $194,000 and represented from two to five times the amount of the "visible" net worth, the pertinent amount of starting point cash in this case is not large, either in amount or in comparison with the "visible" net worth.

The unreported income computed by the Government for the two years (1944 and 1945) totals $43,494.95 (R. 3613). But the great bulk of this results from technical accounting-type adjustments which would not support any inference of fraud. One item of $15,000 consists of the inclusion at the end of 1945 of $15,000 in accounts receivable of the B-R Smoke Shoppe, representing obligations owed by losing bettors who had been permitted to place bets on credit. (The impropriety of this adjustment, even from the viewpoint of technical tax law, is discussed below.) Another $24,369.49 is accounted for by a variety of accounting adjustments, such as the capitalization of repairs and improvements to a bar and an office, and the treatment of excise taxes on liquor as additional cost rather than as a currently deductible expense. In fact, all but $7,000 of the unreported net income computed by the Government consists of these technical adjustments; and if the opening net worth were increased by only $7,000 (which is just five per cent of the "vis-

## Appendix B

### JUDGMENT BELOW.

No. 13,281

*In the United States Court of Appeals for the Ninth Circuit*

ELMER F. REMMER, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

### JUDGMENT

Appeal from the United States District Court for the District of Nevada.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly resubmitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Filed and entered May 23, 1955.

Paul P. O'Brien, Clerk.

## Appendix C

### ORDER STAYING ISSUANCE OF MANDATE.

No. 13,281

*In the United States Court of Appeals for the Ninth Circuit*

ELMER F. REMMER,
*Appellant,*
vs.
UNITED STATES OF AMERICA,
*Appellee.*

Upon application of Spurgeon Avakian, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of *certiorari* to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before June 22, 1955. In the event the petition for writ of *certiorari* is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Clifton Mathews
United States Circuit Judge.

Dated: San Francisco, Calif.
June 3, 1955.

(Endorsed:) Filed June 3, 1955.

Paul P. O'Brien, Clerk.

## Appendix D

### STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

Section 41. General Rules.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1946 ed., Sec. 41.)

Section 145. Penalties.

* * * * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than

$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145(b).)

Federal Rules of Criminal Procedure:

Rule 16. Discovery and Inspection:

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena;

* * * * * * *

(c) *For production of documentary evidence and of objects.* A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

## Appendix E

### INSTRUCTIONS ON NET WORTH METHOD.

*Instruction No. 14*

"The income tax law provides that the net income of the taxpayer shall be computed upon the basis of the taxpayer's annual accounting period, in accordance with the method of accounting regularly employed in keeping the books of the taxpayer; but if no such method of accounting has been employed, or if the method employed does not clearly reflect the income, a computation shall be made upon such basis and in such manner as does fairly reflect the income.

"The Government is authorized by law, if the books of the taxpayer are found to be inadequate, to adopt a reasonable method of ascertaining income. In this case it has undertaken to find out what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show what he had accumulated as income in the meantime.

"If, at the end of a year, a man has in his possession more property than he had at the beginning of the year, it goes without saying that he got it from some place; and, if it is shown that he did not get it by gift or inheritance or loan, it may be inferred that it was part of his taxable income."

*Instruction No. 15.*

"The Government has placed before you evidence relating to the defendant's net worth at the end of each of the years 1943, 1944, 1945, and 1946. A defendant's net worth

at a given time is the difference between all of his assets and all of his liabilities. Loans receivable are to be considered as assets and loans payable are to be considered as liabilities in computing the net worth. Increase in net worth for any year is computed by subtracting the net worth at the beginning of the year from the net worth at the end of the year. In order to compute the defendant's taxable net income by this method you should add the defendant's living and other nondeductible expenses for that year as shown by the evidence and the income taxes which he paid during that year to the increase in net worth. These expenditures should be added because they are not represented in the assets which the defendant has accumulated and are not deductible expenses.

"Expenditures which are deductible under the income tax laws are immaterial and of no significance in computing net income on the so-called 'net worth and expenditures' method. The law provides that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred in carrying on any trade or business. The term 'ordinary and necessary business expense' does not have any specific definition, but it refers generally to expenditures which have a reasonable relationship to the carrying on of a business."

Office Supreme Court, U. S.
FILED
SEP 22 1955
HAROLD B. WILLEY, Clerk

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

**No. 156**

ELMER E. REMMER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

JOHN R. GOLDEN,
LESLIE C. GILLEN,
400 Crocker Building, San Francisco 4, California,
SPURGEON AVAKIAN,
900 Financial Center Building, Oakland 12, California.
*Attorneys for Petitioner.*

LOHSE AND FRY,
40 West First Street, Reno, Nevada,
*Of Counsel.*

ported to the District Court by a juror[4] was harmful to appellant, and if after hearing it was found to have been harmful, to grant a new trial.

Accordingly, the District Court (Judge Louis E. Goodman presiding) held a hearing, and Judge Goodman, on July 10, 1954, filed his opinion, findings and order, thereby finding and determining that the incident was harmless to appellant. A certified copy of Judge Goodman's opinion, finding and order having been transmitted to the clerk of the Supreme Court, and appellant having moved the Supreme Court for leave to file a petition for rehearing, the Supreme Court, on January 10, 1955, made the following order:[5]

"The motion for leave to file and the petition for rehearing are granted. This case is restored to the docket, and the whole record, including the findings and order of Judge Goodman, is remanded to the Court of Appeals for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in Holland v. United States, 348 U.S. 121; Friedberg v. United States, 348 U.S. 142; Smith v. United States, 348 U.S. 147; and United States v. Calderon, 348 U.S. 160, and Judge Goodman's findings and order."

We have complied with the Supreme Court's order and have concluded that our decision of May 28, 1953, and Judge Goodman's findings and order were correct. The

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[4]The incident was described in our opinion (205 F. 2d 277, 291) and in the Supreme Court's opinion (347 U.S. 227, 288).

[5]Remmer v. United States, 348 U.S. 904.

judgment affirmed by us on May 28, 1953, is, therefore, again affirmed.

(Endorsed:) Per Curiam Opinion. Filed May 23, 1955.

Paul P. O'Brien, Clerk.

## Table of Authorities Cited


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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1955

No. 156

ELMER F. REMMER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

This reply brief is filed to call attention to several important cases decided since the Petition for *Certiorari* was printed, and also to point out certain incorrect statements in the Brief for the United States in Opposition.

### I.

The Brief for the United States incorrectly declares (p. 14) that the questions raised in the Petition with

respect to the denial to petitioner of an opportunity to inspect certain of his records held by the Government were not within the terms of this Court's order remanding the case to the Court of Appeals. The remand of this Court on January 10, 1955, specifically declared that the entire matter was being remanded to the Court of Appeals

> "* * * for its consideration on the errors assigned when the case was before the Court of Appeals before * * *"

*Remmer v. United States* (1955), 348 U.S. 904.

It is clear, therefore, contrary to the Government's position, that these important questions which this Court did not find it necessary to decide before were covered by the remand to the Court of Appeals and are properly presented at this time.

II.

The Brief for the United States fails to state that its petition for rehearing in the *Bloch* case, mentioned in our Petition (p. 48, fn. 8), was denied by the Court of Appeals for the Ninth Circuit on June 14, 1955, in an opinion which reaffirms that an instruction on willfulness virtually identical with Instruction No. 19 in this case was such plain and fundamental error as to require reversal even in the absence of an exception in the trial Court. See *Bloch v. United States* (CA 9, June 14, 1955), 223 F. 2d 297, affirming original decision reported in 221 F. 2d 786.

In contrast with its silent avoidance of the *Bloch* decision here, the Government has previously argued

to the Ninth Circuit that *Bloch* was contrary to its earlier decision in the *Remmer* case. See Supplemental Brief for Appellee, dated April 25, 1955, in *Herzog v. United States*, Ninth Circuit No. 14,611, which includes the following in its statement of reasons why the *Bloch* decision should not be followed (p. 7, fn. 1):

> "While *Remmer v. United States*, 205 F. 2d 277, has not been finally decided, an instruction appears therein at page 140 of the record in somewhat similar language. This Court, affirming the conviction, approved the instructions in their entirety."

The *Herzog* case, which involves an instruction on willfulness substantially identical with that given in *Bloch* and *Remmer*, has not yet been decided.

The Eighth Circuit declined to follow the *Bloch* decision in *Banks v. United States* (June 28, 1955), 223 F. 2d 884.

Thus, not only is there a conflict between circuits on this important question, but within the Ninth Circuit itself different panels of judges have reached diametrically opposite conclusions; and the opinion in this case does not even mention the *Bloch* case, although it was called to the Court's attention in our Supplemental Brief filed after the remand, and the cases are not distinguishable.

## III.

With regard to the net worth issues, two additional opinions in conflict with the decision below have been handed down since our Petition was printed.

In *Scanlon v. United States* (June 13, 1955), 223 F. 2d 382, 389, the Court of Appeals for the First Circuit held that the Government's net worth computations involving a cash-basis taxpayer properly excluded "such items as accounts receivable and accounts payable, which are not attributable to the defendant's current income (income being that income which is reportable by a taxpayer on a cash basis)." This holding is contrary to the inclusion in this case of the accounts receivable of the B-R Smoke Shoppe in petitioner's closing net worth. See Petition, pages 41-4.

The decision of the Court of Appeals for the Second Circuit in *United States v. Altruda* (August 2, 1955), ..... F. 2d ....., 55-2 USTC Par. 9592, creates a conflict with the decision of the Court below in still another respect. The *Altruda* case holds that it is reversible error for the Government to include technical adjustments in its net worth computations in a criminal tax evasion case for the reason that this can confuse the jury by implying that the entire amount of additional income computed in this manner is attributable to fraud. In that case, the Government's basic net worth exhibit showed unreported income for the year in question of $8,978.09. Of this amount, $5,788.22 consisted of nonfraudulent adjustments. Even though the fact that this portion of the understatement consisted of technical adjustments was set forth in another Government exhibit, the Court set aside the conviction because the principal net worth exhibit was misleading. As pointed out in our Peti-

tion (pp. 39-40), all but $7,000.00 of the total understatement of $43,494.95 computed by the Government in this case consisted of technical accounting-type adjustments which obviously would not support any inference of fraud. And unlike the *Altruda* case, there was no explanation, even in a separate exhibit, that the Government's case rested almost completely on these technical adjustments.

## IV.

The discussion of the extraneous jury contacts in the Brief for the United States in Opposition shows how completely the Government misconceives its burden of proof in this kind of a situation. For example, in commenting on our point that Smith was never questioned regarding Satterly's remarks about the alleged "under the table" payments made to petitioner on the sale of Cal-Neva Lodge, the Government states as follows (Br. U.S., p. 13, fn. 14):

> "If petitioner felt that this was important, he could have had Smith recalled to the stand for further cross-examination. He did not even suggest this during the proceedings before Judge Goodman."

The fallacy of this argument, of course, is the assumption that the burden was on petitioner to show that these extraneous allegations that he was a tax evader were harmful to him. As this Court pointed out in its previous opinion, however, any such extraneous communication raises a presumption of prejudice

which the Government must overcome. Since the Government did not choose to develop the facts of these highly prejudicial remarks while Smith was on the stand (although its own files contained the FBI memorandum showing that the remarks had been made), and since the Government did not choose to recall Smith for development of further evidence on this point after interrogation of the FBI agent disclosed the fact of this communication, the record is completely devoid of any explanation, and there is accordingly no evidentiary basis whatsoever for the holding that these remarks to the jury foreman were harmless.

Indeed, it is understandable why the Government did not question juror Smith on this matter, for what could he have said that would prove that these obviously prejudicial remarks had no effect on him? Had the Government brought this matter to the attention of petitioner during the trial so that the falsity of Satterly's accusations could have been demonstrated to Smith, there would possibly have been a basis for contending that Smith could continue serving as a juror without prejudice to petitioner. However, since no effort whatsoever was made during the trial to contradict Satterly's statements or to overcome the effect of them, we see no possible basis for contending that this conversation resulted in no prejudice to petitioner.

The Government now concedes that juror Smith at least "had some lingering doubt" as to whether Sat-

terly's remark was simply a joke.* But the Government points to no evidence which shows that this "lingering doubt" was ever overcome. After the FBI agent had interviewed Smith and reported back to the prosecutor and the judge, no further contact was made with Smith, and at no time was he given any information which would throw any light whatsoever on the question of whether Satterly had really been joking rather than feeling Smith out for a possible bribe.

The conclusion that this series of incidents was harmless to petitioner is based purely on conjecture and is not supported by any evidence whatsoever showing that the prejudicial impact of these communications had been overcome. The fact is that the Government made no effort to overcome the impact of these communications, and petitioner himself had no opportunity to do so because the facts were concealed from him by the trial judge and the prosecutors.

The Government's attempt (Br. U.S., p. 14, fn. 15) to distinguish *Stone v. United States* (CA 6, 1940), 113 F. 2d 70, rests on differences in unimportant factual details and ignores the basic principles so clearly set forth in the opinion. In the *Stone* case, the conviction was reversed even though the trial

*The Government brief erroneously states (p. 12) that the conversation between Smith and Satterly was carried on "with no change of tone". The fact is that, according to Smith's wife, who had been paying no attention to the conversation between Smith and Satterly up to that point, Smith raised his voice in informing Satterly that he was forbidden from discussing the case. (Supp. R. 128.)

Court had informed defense counsel of what had occurred and had made a serious effort to impress the juror with the fact that he should rid his mind of any possible prejudice against the defendant. In the *Remmer* case, two jurors carried in their minds throughout the case the possibility that the defendant was seeking to bribe a juror, and one of them, in addition, carried the statement by a purported friend of petitioner that petitioner had evaded his taxes on the sale of Cal-Neva Lodge.

The absence of any effort to neutralize the impact of these extraneous statements leaves no evidentiary support in the record for the contention that there was in fact no harm to petitioner.

Dated, September 19, 1955.

Respectfully submitted,

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
*Attorneys for Petitioner.*

LOHSE AND FRY,
*Of Counsel.*

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1955

## No. 156

EMMER F. REMMER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

## BRIEF FOR PETITIONER.


JOHN R. HOLDEN,

LESLIE C. GILLEN,

400 Crocker Building, San Francisco 4, California,

SPURGEON AVAKIAN,

609 Financial Center Building, Oakland 12, California,

*Attorneys for Petitioner.*

LOHSE AND FRY,

40 West First Street, Reno, Nevada,

*Of Counsel.*

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1955

No. 156

ELMER F. REMMER,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## BRIEF FOR PETITIONER.

### I. OPINIONS BELOW.

The *per curiam* opinion of the Court of Appeals, filed on May 23, 1955, is reported at 222 F. 2d 720 and is set forth at pages 339-40 of the Record. The prior opinion of the Court of Appeals, dated May 28, 1953, is reported at 205 F. 2d 277 and is set forth at pages 3748-77 of the Record in *Remmer v. United States*, No. 304, October Term, 1953. The Opinion, Findings, and Order of the

District Court, filed July 10, 1954, is not reported, but is set forth at pages 33-39 of the Record.

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## II. JURISDICTIONAL STATEMENT.

The Judgment of the Court of Appeals was entered on May 23, 1955 (R. 341). An order staying mandate pending disposition of the Petition for *Certiorari* was entered on June 3, 1955 (App. C, attached to the Petition for *Certiorari* herein). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

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## III. CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves the right to trial by an impartial jury under due process of law, as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States, the pertinent portions of which read as follows:

*Fifth Amendment:*

"No person shall * * * be deprived of life, liberty, or property, without due process of law. * * *"

*Sixth Amendment:*

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. * * *"

## IV. QUESTIONS PRESENTED

A. Where an outsider has informed a juror during a tax evasion trial that the defendant took $350,000 "under the table" on the sale of a business involved in the case, and has made a suggestion of bribery which the juror has reported to the trial judge, and the juror is thereafter interrogated by the FBI, can it be said that the presumption of prejudice was overcome when no effort was made to neutralize the "under the table" statement and the juror was not even questioned at the hearing as to the possible effect of this statement on his view of the defendant's guilt or innocence?

B. In such a situation, can it be said that the prejudicial effect of the bribery suggestion was overcome, when the FBI investigation was held in suspense until after the trial, and no report was made to the juror to the effect that defendant had not been connected with the bribery suggestion?

C. Does the evidence support the conclusion that the juror viewed such bribery proposal as a joke?

D. In view of the fact that, following the FBI's interrogation of the juror, the investigation was held in suspense until after the trial, and no report was made to the juror as to the results of the investigation or the conclusions reached, can it be said that the interrogation of the juror was harmless because it allegedly related to the conduct of a third party rather than the conduct of a juror?

E. Where a deputy marshal who is a personal friend of a juror informs the juror that an attempt had been

made to contact another juror, and no effort is made to counteract or neutralize this false statement, can it be said that the incident was harmless to the defendant?

F. Does the presumption of prejudice arising from private communications with a juror regarding a case require a new trial unless the evidence shows no reasonable possibility of prejudice, or is a new trial required only when the evidence actually shows prejudice in fact?

G. Does such presumption simply require the Government to come forward to establish the facts, without affecting the usual burden of proof on a motion for new trial, or does it require the Government to assume the burden of proving that there was in fact no prejudice?

H. Where, on the basis of an affidavit alleging private communications between a juror and (1) an outsider, (2) the trial judge, and (3) an FBI agent, this Court has remanded the case for a hearing, is the hearing limited to the effect of the communication between the juror and the FBI agent?

I. In such a situation, where the motion for such a hearing requests an inquiry as to all matters pertaining to the incident to determine to what extent it had any effect on the jury, is it within the scope of such hearing to show that a deputy marshal informed one of his juror friends that an attempt had been made to influence another juror?

## V. STATEMENT OF CASE.

Petitioner was convicted in the District of Nevada on February 22, 1952, after a trial lasting almost three months, on four counts of tax evasion, of which two involved his returns for the years 1944 and 1945 and two involved the returns of his wife for the same years. The jury disagreed with respect to two other counts involving the returns of himself and his wife for 1946. The deliberations of the jury lasted two days.

Petitioner made a timely motion for new trial (R. 12-17) in which, among other things, he requested that a hearing be held to develop the full facts with respect to certain extraneous jury contacts indicated in the supporting affidavit (R. 3-12). The denial of that request for a hearing was held erroneous when the case was previously before this Court, and the matter was remanded to the District Court with instructions to hold a hearing and to determine whether "the incident complained of" was harmful to petitioner. *Remmer v. United States* (1954) 347 U.S. 450.

The District Judge assigned to conduct said hearing made an order on July 10, 1954, that the "incident complained of" was harmless. Thereafter, in August, 1954, petitioner filed a petition for rehearing with this Court requesting that the case be restored to the docket and that the other questions involved in the writ of *certiorari* be decided (No. 304, October Term, 1953). On January 10, 1955, this Court granted the petition for rehearing, restored the case to the docket, and remanded the whole record, including the findings and order of the judge who

conducted the hearing on the extraneous jury contacts, to the Court of Appeals —

> "• • • for its consideration on the errors assigned when the case was before the Court of Appeals before, in order that the Court on the whole record may reconsider the case in the light of our recent decisions in *Holland v. United States*, 75 S.Ct., 127; *Friedberg v. United States*, 75 S.Ct., 138; *Smith v. United States*, 75 S.Ct., 194; and *United States v. Calderon*, 75 S.Ct., 186, and Judge Goodman's findings and order.
>
> Mr. Justice Black would reverse the judgment of conviction and grant a new trial in view of the jury incident discussed in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct., 450, 98 L.Ed. 654."
>
> *Remmer v. United States* (1955) 348 U.S. 904.

The Court of Appeals thereafter authorized the filing of concurrent supplemental briefs limited to the net worth issues. On petitioner's motion for permission to file *seriatim* briefs and to submit oral argument on the questions raised by the hearing on the extraneous jury contacts, the Court of Appeals enlarged the scope of the concurrent briefs to include the jury contact questions but ordered the case submitted without oral argument (R. 337-9). The judgment of the District Court was affirmed in a *per curiam* opinion dated May 23, 1955, which did not discuss any of the issues in the case (R. 339-40).

The order granting the Petition for *Certiorari* limits the case to the questions presented by the extraneous jury contacts. *Remmer v. United States* (1955) 350 U.S. 820.

The facts developed at the hearing conducted pursuant to the previous remand ordered by this Court show that there were four extraneous contacts with jurors during the course of the trial. One was between the jury foreman, I. J. Smith, and a James Satterly. A second was between Smith and the Trial Judge. The third was between Smith and FBI agent Callister. The fourth was between juror Richard J. Curnow and a deputy United States Marshal. The first three contacts were indicated in the newspaper stories which were made a part of the affidavit in support of the motion for new trial (R. 6-12) and were mentioned in the prior opinion of this Court. *Remmer v. United States* (1954) 347 U.S. 227, 228. The fourth contact between juror Curnow and the deputy United States Marshal was not known to petitioner or his counsel until 1953 (R. 200-202).

The actual circumstances and content of these communications did not become known to petitioner or his counsel until June, 1954, when the hearing requested in February, 1952, was finally conducted pursuant to order of this Court; and at that time the testimony suffered from the inevitable erosion of memory during the intervening two and a half years. As developed in the Record, however, the following circumstances occurred.

On December 18, 1951, after the trial had been in progress approximately three weeks, jury foreman Smith was visited in his home one evening by James Satterly, who was a personal friend and an insurance client of Smith. Satterly discussed some changes in his automobile insurance policy and there was also talk about an accident he had had (R. 50). Satterly had worked as a crap-dealer

in various gambling establishments in Reno, Nevada, and Smith knew that he was an ex-convict (R. 168). During the course of the discussion, Satterly commented on Smith's status as a juror and made the following statement (R. 167):

> "I know Bones Remmer very well. He sold Cal-Neva for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—Why don't you make a deal with Bones?"

Smith noticeably raised his voice in replying that he was forbidden by the instructions of the judge to discuss the case (R. 128).

Two days later, on December 20, 1951, Smith reported this incident to Trial Judge Foley and quoted Satterly as having made the following statement (R. 134):

> "I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?"

After advising Smith that Satterly might have been joking (R. 81, 134), Judge Foley held a meeting with Assistant United States Attorney Thompson and perhaps other members of the prosecution staff. At this meeting, it was decided to investigate the incident to see whether it had any connection with the defense, and it was also decided not to inform defense counsel in order not to frustrate the investigation (R. 135-7, 227-8).

Accordingly, on December 22, 1951, FBI agent Callister called on Smith and stated that he had been requested to conduct an investigation relating to Smith's talk with Satterly to determine whether an attempt had been made to exert any influence on Smith as a juror

(R. 58, 152, 169-70). Callister made notes of what Satterly had said to Smith and of Smith's relationship with and knowledge of Satterly, and of the fact that Satterly was moving to another state (R. 166-8).

On December 24, 1951, without having interviewed Satterly, FBI agent Callister reported to Assistant United States Attorney Thompson that there was nothing to indicate a connection between Satterly and the defense, and on Thompson's instructions he gave a similar report on January 4, 1952, to Judge Foley, who told him that "no further investigation was required at that time." (R. 157-8, 230, 233.)

Accordingly, the investigation was held in abeyance and no further work was done on it until approximately March 10, 1952, after petitioner had been convicted. At that time, in a meeting between Callister and Thompson, it was decided to terminate the investigation (R. 158, 230). No further information was conveyed to Smith at any time (R. 261). Thus, he was held in suspense throughout the trial as to the results of the investigation or whether it had been completed; and no effort was made to neutralize the effect of Satterly's false statements that he knew Remmer well[1] and that Remmer had received "under the table" money on the sale of Cal-Neva. Nor was any inquiry made as to the impact on Smith of the "under the table" statement. On the contrary, the Trial Judge and the prosecutors were interested only in determining whether the defense had attempted to tamper with the jury (R. 137, 228).

---

[1]Satterly testified at the hearing in June, 1954, that he knew petitioner only by sight, and not personally (R. 118).

At no time did either the Judge or the prosecutors give any of this information to defense counsel.

And at the hearing in June, 1954, the fact that Satterly had made this statement regarding the Cal-Neva sale was not disclosed while Smith was on the witness stand; and he was not recalled, after the development of this fact through Callister's testimony, for questioning as to the possible impact of this statement on him, nor was any effort made to inquire further into this phase of the matter. The District Judge made a finding that this remark about "under the table" money had been made (R. 34) but concluded, without any statement of his reasons or recital of facts upon which he relied, that the statement was harmless (R. 39).

On the way home from the Court immediately after the verdict on February 22, 1952, Smith told juror Tinkham that it was possible he had been approached (R. 184), and he thanked juror Mack for finding Remmer guilty and said that someday he would tell her why he was so interested (R. 174, 177-8). Two weeks later, when he encountered alternate juror Morris, he related that he had been told during the trial that he could make a lot of money by stringing along with Remmer (R. 221).

In view of Satterly's statement to Smith that petitioner received $350,000 "under the table" on the sale of Cal-Neva, it is noted that petitioner's connection with Cal-Neva throughout the prosecution period was prominently mentioned in the trial (e.g., see pages 1593-6, 1903-17, 1925-35, 2218-21, 3027-36, 3073-4, 3111-16, 3602-6, 3612-13 of the Record on file with this Court as No. 304, October Term, 1953). His subsequent sale of Cal-Neva was also

brought to the jury's attention a number of times (e.g., see pages 1930-3 and 3029-36 of the Record on file with this Court at No. 304, October Term, 1953).

Satterly, incidentally, categorically denied at the hearing that the incident described by Smith had ever occurred, and this denial was supported by the testimony of his wife, who was present during the conversation in which the incident occurred (R. 114, 118-9, 125).

During the trial, probably in January, 1952, juror Curnow and Deputy United States Marshal Boyd had a conversation which led Curnow to believe that an attempt had been made to contact one of the jurors, and that the juror involved was probably Mrs. Mack. On March 23, 1954, Curnow gave FBI agent McGee an affidavit (Ex. F, R. 210-11) reciting that during the trial Deputy Marshal Boyd had asked him if he had heard of anyone on the jury being contacted, or had heard any discussion among the jurors indicating that a juror had been contacted; that he had replied to Boyd in the negative; that at the time he had thought Boyd's remark related to juror Mack, since he had seen her going into the Judge's chambers; that later (it does not appear when) he had learned that Mrs. Mack had been discussing an illness problem with the Judge; and that these facts had not influenced his decision.

Curnow told one of the defense attorneys in December, 1953, that an assistant marshal had asked him, about half way through the trial, if anyone had tried to approach him on the case and that, when Curnow asked why he was inquiring, the assistant marshal had stated: "He tried to bribe one of the jurors." (R. 265.)

At the hearing in June, 1954, Curnow testified that one of the marshals asked him if he had heard any discussion by the jurors about anyone being approached; that he replied in the negative and asked why the question had been put to him; and that the marshal replied that he was just curious (R. 200). He first testified that he was uncertain as to which marshal had spoken to him (R. 203), but after his FBI affidavit was produced, he identified Boyd as the one who had talked to him, and conceded that he had known Boyd personally for several years (R. 208).

Boyd testified that he had known Curnow personally since 1948 and had participated with him in rifle and pistol shooting contests, and that during the trial he had talked to Curnow "concerning shooting" several times, but denied that he had ever had any conversation with Curnow regarding attempts to contact jurors (R. 249-252).

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## VI. SUMMARY OF ARGUMENT.

The extraneous communications were obviously prejudicial to petitioner. A man purporting to be his friend advised the jury foreman, in substance, that petitioner was a tax evader, and suggested that a "deal" be made. No effort was made at any time to neutralize these statements. The jury foreman was not even questioned at the hearing regarding the tax evasion allegation, nor was this portion of the extraneous communication mentioned in his discussion with the Trial Judge. The seriousness of the "bribery" suggestion was emphasized by the fact

that the FBI interrogated the juror during the trial, but never informed him that petitioner had no connection with the proposal.

There was a real danger of intimidation of the jury foreman in the fact that, after he was interrogated, the FBI held its investigation in suspense until after the verdict and thus continued to look over his shoulder during the remaining two months of the trial.

The deputy marshal's statement to one of his juror friends that jury tampering had been attempted was likewise never neutralized.

In holding that no harm to the petitioner had been shown, the District Court failed to apply the rule of law announced by this Court in *Remmer v. United States* (1954) 347 U.S. 227; and in numerous Appellate Court decisions, that there is a presumption of prejudice which the government must overcome by an affirmative showing of no prejudice. The District Court instead viewed the presumption of prejudice only as requiring the Government to present the evidence and considered that thereafter the situation was the same as in any motion for new trial—namely, that no new trial would be granted unless the evidence affirmatively showed prejudice as an actual fact. The correct rule is that extraneous communications relating to the case require a new trial unless it affirmatively appears that there is no reasonable possibility that the defendant was prejudiced.

The District Court also misconstrued the mandate of this Court, and erroneously considered that the scope of the hearing was limited to the communication between the FBI agent and the jury foreman. The remand was

ordered by this Court, however, for the purpose of developing all of the circumstances relating to the invasion of petitioner's right to trial by an impartial jury: and the impact of Satterly's statements to the jury foreman is just as important as the effect of the FBI investigation. Likewise, the inquiry which the deputy marshal made of another juror and the misinformation which he gave that juror that an attempt had been made to influence another juror, were also related to petitioner's request for a hearing and therefore within the scope of the hearing.

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## VII. ARGUMENT

There were three extraneous communications regarding the case with juror Smith (the foreman) and one with juror Curnow. Since the hearing at which the facts were developed was not held until two and a half years later, the evidence is not as clear-cut in its details as it might have been. However, it clearly establishes the substance of what was said and done, and, to the extent that it is vague and uncertain, the doubts must be resolved in favor of petitioner, both because the presumption of prejudice runs in his favor and because respondent itself (together with the Trial Judge) is responsible for the long delay in holding the hearing.

The conclusion of the lower Court that these extraneous contacts did not prejudice petitioner is incorrect for the following reasons: (a) The evidence does not overcome the presumption of prejudice; (b) the District Court applied incorrect rules as to the effect of the presumption

of prejudice; and (c) the lower Court misconstrued the scope of the hearing ordered by this Court.

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**A. THE PRESUMPTION OF PREJUDICE WAS NOT OVERCOME.**

In the prior opinion in this case, the rule that an extraneous contact with a juror raises a presumption of prejudice which the Government has the burden of overcoming was stated by this Court in the following language:

> "In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."
>
> *Remmer v. United States* (1954) 347 U.S. 227, 229.

The communications with the jurors in this case were prejudicial to petitioner in four different respects, as more specifically discussed below.

**1. The implication that petitioner had evaded his taxes on the sale of Cal-Neva Lodge was never negatived.**

Satterly clearly implied to Smith that petitioner (whom he allegedly knew "very well") had evaded his taxes on the sale of Cal-Neva Lodge. That is the obvious interpretation of Satterly's statement to Smith (R. 167):

"I know Bones Remmer very well. He sold Cal-Neva for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daresn't touch—Why don't you make a deal with Bones?"

Petitioner was on trial for tax evasion. The reference to "under the table" money has an obvious reference to tax evasion, as does the mention of money "he daresn't touch". Moreover, petitioner's interest in Cal-Neva during the prosecution years and his subsequent sale of it were constantly before the jury in the trial. Without any discussion of the possible impact of these statements on Smith, the District Judge's opinion simply finds that "under all the circumstances, it was harmless" (R. 39). But the Court does not state what these "circumstances" are, and examination of the Record shows that there is no evidence whatsoever in the Record to support this conclusion. Smith did not mention these Cal-Neva references when he reported the incident to the Trial Judge; rather he spoke only of the bribery suggestion (R. 55-6, 134, 139). When the Government presented Smith as a witness at the hearing, he again mentioned only the bribery suggestion (R. 52), and Government counsel made no reference whatsoever to the Cal-Neva portion of the conversation, notwithstanding the fact that (as developed later in the hearing) the FBI report (Ex. D, R. 166-8, particularly 167) showed that this statement had been made.

On the following day of the hearing, after the testimony of FBI agent Callister developed the fact that these damaging accusations of tax evasion on the Cal-Neva sale had been made, Smith was not recalled as a witness, and,

accordingly, there is no testimony whatsoever in the Record as to the possible effect which this statement might have had on him.[2]

The fact that this statement had been made was discovered by the Government on December 22, 1951, when FBI agent Callister talked to Smith. If Smith had promptly been advised that Satterly was lying when he told Smith that he knew petitioner "very well", and if Smith had further been advised that there was no truth in Satterly's statement that petitioner had received $350,000 "under the table" in connection with the Cal-Neva sale, there would now be some basis for contending that the prejudicial effect of these statements had been overcome. Or if the Record showed that Smith had known of the falsity of these statements because of other sources of information, that also might have furnished the basis for concluding that Satterly's statements were harmless. The Record, however, is completely devoid of any evidence whatsoever which has even a remote bearing on the effect which these false accusations had on the juror.

We think the key to the District Court's light dismissal of these highly prejudicial remarks lies in a misconception as to the scope of the hearing. At the conclusion of the evidence and just prior to oral argument, the Court

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[2]Respondent suggests in its Brief in Opposition (p. 13, fn. 14) that petitioner should have recalled Smith for further cross-examination if this matter were considered important. This, however, assumes that the burden of proof was on petitioner, and, more importantly, it overlooks the fact that the only way the prejudicial effect of this damaging statement could have been overcome would have been to have neutralized it in Smith's mind during the trial itself.

stated (R. 275) that in its view the Supreme Court's remand

> "was not for the purpose of considering whether or not the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me."

As set forth below, we believe this restrictive interpretation of the remand is erroneous.

**2. The evidence does not establish that Satterly's "bribery" proposal was harmless.**

It should be noted that nowhere in the "Opinion, Findings and Order" is there a finding that Satterly's "bribery" proposal was harmless in its impact on Smith. The absence of such a finding no doubt stems from the lower Court's belief, as stated during the hearing (R. 275) and as reflected in its Opinion, that the hearing was limited to the effect on Smith of the FBI investigation.

But even if such a finding had been made, it would be without evidential support. The lower Court's opinion recites that Smith regarded the comment as "jocular" (R. 35), but the Record shows that neither Smith nor anyone else *treated* the incident as a joke, and respondent now concedes that Smith at least "had some lingering doubt". (Br. in Opp., p. 12).

Note, preliminarily, that Smith described Satterly not only as a business client but also as a sportsman who

had shared Smith's hobby of hunting and fishing. He knew Satterly "quite well", discussed their mutual hobby with him from time to time, and the two families had spent time together at a hunting club (R. 51, 130).

Despite this close business and personal relationship, Smith noticeably raised his voice in admonishing Satterly that he could not discuss the case (R. 128). And this "joke" disturbed him so much that after mulling it over for two days, and feeling the need for "some counsel relative to it", he decided to discuss it with Judge Foley, since he did not feel free to talk either to his wife or to his attorney (R. 54).[3]

Smith says Judge Foley told him to regard the incident as a joke (R. 56). But whatever curative effect this might have had was certainly dispelled two days later when the FBI agent called on him. How could he possibly have felt satisfied then that the Government thought this to be a joke?

The subsequent actions of the Government representatives are also revealing. The FBI investigation was not closed after the interview with Smith on December 22, 1951. Rather, it was held open until March 10, 1952 (16 days after the verdict), and only then was the decision made that no further investigation was warranted.

Thus, the FBI continued to look over Smith's shoulder until the verdict came in. Whether they would have

[3]He did this even though he knew at the time that he was not required by the Trial Judge's instructions to report such incidents unless the party "persisted" in discussing the case after being advised that such discussion was improper (R. 53-4).

dropped the investigation had Remmer been acquitted is problematical—but the fact remains that, all during the trial, Smith was left uneasy as to how the Government interpreted the incident, what Satterly had told the FBI (it anything), and whether a vote for acquittal would mean further questioning by the FBI. None of this supports the "joke" theory.

If the Trial Judge and prosecutors had really considered the whole thing a "joke", would they not have terminated the investigation right then, instead of delaying the decision for two months, until after the conviction? And would they not have informed Smith promptly so that he could relieve himself of the anxiety and concern which had prompted him to report the incident?

Moreover, the Trial Judge and prosecutors, if they had really concluded that this was a "jocular" incident, would also have advised defense counsel of the incident, so that petitioner's rights could have been protected fully. We repeat here that the reason given by the Trial Judge and the prosecutor for not informing petitoner's lawyers was that to do so might frustrate the investigation (R. 137, 228).

The plain and obvious fact is that the Trial Judge and prosecutors thought a possible attempt had been made to bribe the jury, and this thought was not abandoned until *after* the jury had convicted petitioner.

Thus, instead of minimizing or neutralizing any thought on the part of juror Smith that he had been the object of a bribery attempt, the conduct of the Trial Judge, the prosecutor and the FBI served to emphasize the possibility that the bribery suggestion was a serious one. This

obviously must have magnified, rather than removed, the prejudicial effect of the incident.

**3. The pendency of the FBI investigation throughout the balance of the trial deprived petitioner of his right to an impartial jury.**

After the FBI agent had interviewed Smith, the prosecutor and the Trial Judge decided to suspend further investigation until after the trial, and the matter remained pending until after petitioner was convicted. During this entire period of two months, no further statement was made to juror Smith regarding the matter, and he was not advised as to whether the FBI had reached any conclusions, and, if so, what they might be. A juror cannot be expected to free himself of the obvious restraint and concern which such a situation creates. This Court recognized the error which is inherent in this practice in the following statement in its prior opinion in this matter:

> "The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder."
>
> *Remmer v. United States* (1954) 347 U.S. 227, 229.

The lower Court's opinion disposes of this Court's statement in the following manner (R. 37):

> "It is not true that the FBI agent was sent to investigate the foreman of the jury as to his conduct, as was conjectured in the opinion of the Supreme Court (p. 229). There is not the slightest doubt, and I so find, that the purpose of the investigation was to determine whether or not *Satterly* had committed an offense."

The opinion of the District Judge also describes the FBI interrogation of Smith in the following words (R. 35):

> "Mr. Callister then interviewed Foreman Smith, advising him at the time that he, Smith, was not being investigated, but that the FBI was making an investigation to determine whether or not there had been a violation of law by Satterly."

This attempt to compartmentalize an FBI inquiry is completely unrealistic and presupposes superhuman objectivity and freedom from anxiety on the part of a juror.

To begin with, the statement of FBI agent Callister to Smith was not quite as set forth in the portion of the District Judge's opinion just quoted. On direct examination, Mr. Callister stated that he had explained the purpose of his visit to Smith in the following words (R. 152):

> "I told him I had been requested to conduct an investigation relating to his talk with Mr. Satterly and the possibility of an improper approach."

At the conclusion of Mr. Callister's cross-examination, he made substantially the same statement in response to a question from the Court, as follows (R. 169-170):

> "Q. (By the Court): Will you tell me precisely what you said to Mr. Smith as to the object of your inquiry of him?
>
> A. I told him that the matter had been referred to me by the United States attorney, in which he told me that Judge Foley would like to have some inquiry made as to this talk with Mr. Satterly, to determine whether an attempt had been made to exert any influence on a juror at a trial before Judge Foley."

The Court then continued the questioning in the following manner (R. 170):

"Q. Did you say to Mr. Smith, in either words or effect, that you were in any way investigating his conduct?

A. I know there was never any inference of attacking his conduct. The whole idea was to determine whether the person who contacted him was violating some law.

Q. Did you say that to him when you initiated the inquiry to him?

A. Did I say what?

Q. Did you say to him whether or not the inquiry which you were making was for the purpose of investigating the conduct of a man by the name of Satterly?

A. Yes, I explained that was the purpose of the investigation."

This addendum to the testimony is the basis for the finding that the Government was interested only in what Satterly had said and done and not in what Smith had said and would do. If this were the case, it seems remarkably strange that the Government made no effort to interview Satterly (R. 157), even though Smith had given Satterly's out-of-state address to the FBI agent (R. 60, 77), and had mailed Satterly an insurance policy which Satterly had received (R. 121). We think it is clear from the Record that the chief concern of the Trial Judge and the prosecutors was whether the *Government* was being deprived of an impartial jury. The Government did not even interview Satterly until two and a half years later, and then apparently only in preparation for the hearing ordered by this Court (R. 120).

It is inconceivable that the FBI would have pre-judged the end result of its investigation before it interviewed any of the witnesses. What was being investigated was a possible attempt at, or a preparatory step to, a bribe. Smith's reaction to Satterly's suggestion was necessarily pertinent to this investigation. How ask Smith what he understood Satterly to mean, and his knowledge of Satterly's past and connections, if any, with Remmer or his friends, without making even a paragon of rectitude wonder whether he himself would be suspect if his verdict favored the defendant?

Suppose the agent were investigating only Satterly and Satterly's connection, if any, with the defense. That Satterly was the initial object of the investigation would provide no immunity for Smith if any grounds appeared later to indicate that Smith might be implicated. Neither Smith nor Callister knew that Satterly would not be interviewed until years later or that when interviewed he would not implicate Smith.

For all Smith knew, Satterly (a known felon[4]) might have told the FBI that Smith was the one who proposed the bribe and Satterly the one who rejected it. We remind the Court that when Satterly finally was interviewed, he disagreed sharply with Smith and denied (with his wife's corroboration) that the incident had ever occurred (R. 114, 118, 125).

That Satterly's, rather than Smith's, possible connection with the defense were being investigated, would to no degree prevent Smith receiving an impression prejudicial to the defendant from a unilateral interrogation by

[4]Smith told the FBI agent that Satterly had served time in a penitentiary (R. 168).

a Government agent. In the long weeks of the trial between the original contact and the verdict it would have been only human for Smith to wonder whether in fact the defense was responsible for Satterly and whether the FBI thought he (Smith) had any culpable part in it. For aught Smith knew (information being conspicuously absent after he had told Callister all he knew of Satterly), the FBI was only waiting to see whether he voted for or against Remmer before making its final evaluation of the whole incident.

That the incident actually remained on the top of Smith's mind is shown by the fact that on the way home from the Court, immediately after the verdict, two whole months later, he told juror Tinkham that it was possible he had been approached (R. 184) and he thanked juror Mack for finding Remmer guilty and said that some day he would tell her why he was so interested (R. 174, 177-8). Two weeks later, when he encountered alternate juror Morris, he related that he had been told during the trial that he could make a lot of money by stringing along with Remmer (R. 221).

**4. The Curnow-Boyd incident was not shown to be harmless.**

Whether Deputy Marshal Boyd's private communication with juror Curnow was within the scope of the hearing is discussed below. In this section of our brief, we point out that there is no factual basis for considering the incident harmless. Whatever the exact details may have been, it is clear that the deputy marshal said something to Curnow which led the latter to believe that an attempt had been made to influence one of the other jurors (who Curnow thought at the time was Mrs. Mack).

The prejudicial effect of such a statement to a juror by a deputy marshal who is also a personal friend is too obvious to need elaboration. Even if an effort had been made to overcome this prejudicial effect by a full hearing during the trial, it is doubtful if the prejudice could have been removed. See, for example, *Stone v. United States* (CA 6, 1940) 113 F. 2d 70, where the conviction was reversed, even though the trial judge immediately notified the defense and did everything in his power to neutralize the prejudicial effect of the attempted approach.

But here, there was no neutralization of the remark, and it remained with the juror throughout the trial untarnished by any attempted correction or retraction. The following language of the *Stone* case is even more appropriate here than in the facts of the *Stone* case:

> "* * * it is essential to faith in the jury system that jurors should determine the facts submitted to them wholly on the evidence offered in open court, unbiased and uninfluenced by anything they may have seen or heard outside of the actual trial of the case.
>
> There is no right more sacred than the right to a fair trial. There is no wrong more grievous than its negation.
>
> * * * the object of a jury trial would be subverted if they were allowed to communicate with other persons, or other persons to communicate with them, unless for some purpose of necessity and in the presence of the court.
>
> Any course is clearly illegal which would expose them to the danger of influence outside the court. *If a single juror is improperly influenced, the verdict*

*is as unfair as if all were.* The presumption is always in favor of good character but the law concerning juries provides strictly that all jurors be secluded from outside influences and *presumes that such influence may act upon some of them, and may act so as to be beyond detection. Stone v. U.S.* 113 F.(2d) at 77. (emphasis supplied)."

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**B. THE LOWER COURT APPLIED INCORRECT RULES AS TO THE EFFECT OF THE PRESUMPTION OF PREJUDICE.**

**1. The lower Court refused to follow the rule that the presumption of prejudice requires a new trial unless the circumstances foreclose any reasonable possibility of harm.**

The rule consistently followed by the cases which have passed on this question is that upon a showing of extraneous communications of a serious nature relating to the case (as distinguished from trivial departure from formalities or casual conversation unrelated to the defendant or to the case) the presumption of prejudice requires a new trial, unless the circumstances foreclose any reasonable possibility of harm.

*Stone v. United States* (CA 6, 1940) 113 F.2d 70, 77;

*Little v. United States* (CA 10, 1934) 73 F.2d 861, 865;

*Rabenstein v. United States* (CA 10, Sept. 1, 1955) — F.2d —, 55-2 U.S.T.C. Par. 9708;

*Ryan v. United States* (D.C.Cir. 1951) 191 F.2d 779, 783;

*United States v. Marine* (D.C.Del. 1949) 84 F. Supp. 785, 787.

In the language of the *Stone* case (113 F.2d at 77):

> "The question is, not whether any actual wrong resulted from the conversation * * * under the circumstances related, but whether it created a condition from which prejudice might arise. * * *"

The District Judge's opinion here specifically rejects this rule of law in the following language (R. 38):

> "But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact."

A similar and even more pointed rejection of the *Stone* case is found in the District Judge's comment on that case during oral argument, where he stated that the *Stone* case was "inconsistent in legal reasoning" and would require the Court to "enter the field of speculation" (R. 318).

The lower Court's refusal to follow the objective test of whether the evidence foreclosed all reasonable possibility of prejudice, and its determination that there was in fact no harmful impact, is squarely contrary to the reasoning of the *Stone* case that bias and prejudice are often unconscious, that "inward sentiments cannot always be ascertained", and that whether a juror "leaned one way or the other because of the occurrence, is beyond ascertainment" (113 F.2d at 77).

In *United States v. Marine* (D.C.Del. 1949), 84 F.Supp. 785, 787, the Court says:

"The only question here is whether the circumstances detailed at the hearing *affirmatively* indicate that no prejudice *could* result to the defendant." (Emphasis supplied.)

See, also, *Little v. United States* (CA 10, 1934) 73 F.2d 861, 865:

"There is nothing * * * in this record to support a finding * * * that the error was *necessarily* harmless." (Emphasis supplied.)

See, also,

*Mattox v. United States* (1892) 146 U.S. 140;

*United States v. Rakes* (E.D.Va. 1947) 74 F.Supp. 645.

Actually, the "conjecture and hypothesis" lie not in the objective rule of the *Stone* and similar cases, but rather in the statement of the lower Court here that the extraneous contacts were "entirely harmless * * * and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any of the members of the jury." (R. 38.)

The impact on a juror's mind of what occurs in a case is not so easily known.

"Jurors are human and are not always conscious to what extent they are in fact biased or prejudiced, and their inward sentiments cannot always be ascertained. In the present case, *the juror commendably showed anxiety at the approach to him concerning the case and whether he leaned one way or the other because of the occurrence, is beyond ascertainment.*" (Emphasis supplied.)

*Stone v. United States*, 113 F.2d at 77.

Once the nature of the extraneous contacts was developed in the Record, and it became evident that they involved communications of a very serious nature (viz., a possible bribery approach, a statement by an alleged friend that petitioner had concealed $350,000 of profit on the sale of Cal-Neva, and a report to another juror that bribery had been attempted—the seriousness of all of which was emphasized by the making of inquiries by the FBI and the deputy marshal), the question became: was the possibility that Smith or Curnow was left with a conscious or subconscious bias against petitioner, or a fear that the Government might be suspicious if they voted for petitioner, removed beyond reasonable doubt?

"Evidence beyond reasonable doubt" is a time-honored objective standard well understood by the courts. It has been made the criterion of prejudice in jury contact cases because it avoids the conjecture of what subjectively lies in the juror's mind, which is actually "beyond ascertainment."

Thus, the lower Court's holding here itself rests on the conjectural and speculative basis which the authorities uniformly reject.

We have found no case which rejects the rule stated above, nor is there any case to our knowledge which applies a contrary rule.

There are, of course, cases in which the extraneous conversations are clearly unrelated to the case on trial or obviously free of possible ulterior motive, and cases in which the defense has knowledge of the communication but does not object, or in which, for example, the judge

makes a routine inquiry at the door of the jury room which he could have made in the courtroom and which could not possibly be interpreted as covert.

See

*United States v. Compagna* (CA 2, 1944) 146 F.2d 524;

*Higgins v. United States* (D.C.Cir. 1946) 160 F.2d 222 (for facts see *Higgins v. United States* (D.C. Cir. 1946) 160 F.2d 223);

*Ryan v. United States* (D.C.Cir. 1951) 191 F.2d 779.

But in these cases as well as in those which reverse for prejudicial error, the rules are stated as hereinabove quoted. As far apart as the poles are the facts in the *Remmer* case and those in the *Compagna* case relied on by the District Judge (R. 39). In the *Compagna* case the judge on his way to lunch stopped at the door of the jury room and asked if the note the jury had sent him meant that they wanted certain testimony read to them, and upon receiving an affirmative answer told the jury the testimony would be ready and read to them after lunch; of this innocent incident (of which, moreover, the defense apparently was aware at the time and made no objection) the Court in the *Compagna* case says at page 528:

> "... it is most undesirable that anything should reach a jury which does not do so in the courtroom. This is, indeed, too well settled for debate. Mattox v. United States, 156 U.S. 140, 150; 13 S. Ct. 50; 36 L.ed. 917; Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81; 39 S. Ct. 435; 63 L.ed. 853; Dodge v. United States, 2 Cir., 258 F. 300, 303, 304; 7 ALR

1510; Little v. United States, 10 Cir., 73 F.2d 861, 864, 865; 96 ALR 889. But, like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity. Dodge v. United States, supra, 258 F. 300; 7 ALR 1510; Rice v. United States, 2 Cir., 25 F.2d 689, 696; United States v. Graham, 2 Cir., 102 F2d 436, 444. There cannot be the slightest doubt here that the informality—for, at most, it was no more—did not prejudice the accused."

Similarly, in the *Ryan* case the extraneous contact was unrelated to the case and clearly involved no implication adverse to the defendant, nor did it cast any reflections on his honesty or integrity. In upholding the Trial Judge's conclusion that the presumption of prejudice had been overcome, the Court of Appeals specifically and pointedly approved the rule of the *Stone* case, and declared that, since an overture in the nature of bribery was involved there, the Court had *properly* applied the principle that reversal is required unless it is shown that "no injury *could* have occurred." *Ryan v. United States*, 191 F2d at 783. (Emphasis added.)

The distinction made in the *Ryan* case is clear. A showing that the extraneous communication was free of any implications adverse to the defendant warrants a finding that no prejudice occurred in fact. But if the extraneous communication contains prejudicial material, relating either to the case or to the defendant's character, the presumption of prejudice can be overcome only by a showing that there is no reasonable possibility that prejudice occurred.

Respondent's Brief in Opposition (p. 14, footnote 15) seeks to distinguish the *Stone* case upon the ground that it would have been decided differently had not the Trial Judge interrogated each of the jurors. While that is what happened in that case, there is nothing in the opinion to indicate that that fact is decisive; on the contrary, it is expressly noted (113 F.2d at 77) that "If a single juror is improperly influenced, the verdict is as unfair as if all were."

> "It is an axiomatic principle firmly embedded in the field of fundamental law that it is vital to the judicial system that a jury shall determine the case free from external causes which tend to disturb the full and untrammelled exercise of deliberate and unbiased judgment, and that no ground of suspicion that the administration of justice has been thwarted by deliberate interference with that function of the jury can be tolerated. Within the range of that general rule lies the interdiction upon a party litigant subjecting members of the jury to critical surveillance for the purpose of ascertaining their acts and conduct while serving on the jury."
>
> *Rubenstein v. United States*, (CA 10, Sept. 1, 1955) ..... F.2d ....., 55-2 U.S.T.C. Par. 9708.

In the *Rubenstein* case, the Treasury Agents and the grand jury had previously questioned the jury panel from which the *Rubenstein* trial jury had been drawn to determine whether any of them had been approached on behalf of a defendant in a prior unrelated case. Although it was stipulated on appeal that each juror had replied in the negative, and a transcript of the grand jury proceedings was made a part of the appellate record, the Court re-

manded the case for a hearing, with directions to grant a new trial if these incidents "did affect *or reasonably tended to affect* the full and free exercise of the calm and informed judgment of *any* member or members of the jury. * * *" (Emphasis added.)

**2. The lower Court erroneously considered the presumption of prejudice as purely procedural.**

A reading of the comments of the District Judge during the course of oral argument as to the effect of the presumption of prejudice in this case clearly shows that in making its findings the Court considered that once the evidence was presented the presumption of prejudice disappeared and the inquiry became simply whether the evidence showed that the defendant was in fact harmed (R. 314-319). The following excerpts from the statements of the District Judge will show that his view of the presumption was simply that it required the Government to come forward with the evidence; and that, once the facts had been made a matter of record, the presumption of prejudice had no effect, the risk of non-persuasion was on the defendant, and a new trial was to be granted only if the facts persuaded the Court that the defendant had been harmed:

> "* * * However, when all of the facts were exhibited, as they would be on a motion for a new trial, we then have to determine, as a matter of fact, rather than as a matter of law, whether or not the facts as stated showed that there was harm or not to the defendant. Now isn't it important, in resolving that issue, to show whether or not the facts as presented indicate any harm to the defendant." (R. 315.)

* * * * * * *

"* * * Are we not then confined to the question of fact, as to whether or not the juror was influenced *in such a way as to be harmful to the defendant, not in such a way as his judgment might not have been affected in one way or another*, but it was affected in such a way *as was harmful to the defendant*. I think in the last analysis that is the problem that is presented here. * * *" (R. 315-6.) (Emphasis supplied.)

"* * * so when the Supreme Court has relegated this matter for a factual hearing, which is a proper hearing on a motion for a new trial, and while there isn't much factual dispute in the case, and I think practically none in material respects, *the Court still has to determine from those facts whether or not that was in fact, on the basis of those facts, a situation that was harmful to the defendant.*" (R. 316.) (Emphasis supplied.)

In short, the District Judge's view of the issue was that the Government was required to show the facts, but that the facts, when established, had to show prejudice affirmatively before a new trial would be granted, as distinguished from granting a new trial unless the facts affirmatively showed the absence of prejudice. This is contrary to the law of the case, as stated in the opinion of this Court, as follows (347 U.S. at 229, emphasis supplied):

"* * * *The burden rests heavily upon the Government to establish* * * * *that such contact with the jury was harmless to the defendant.*"

### C. THE LOWER COURT MISCONSTRUED THE SCOPE OF THE HEARING ORDERED BY THIS COURT.

The District Judge's interpretation of this Court's mandate was that the hearing should be concerned only with the effect of the FBI agent's interview with juror Smith, and not with the Satterly-Smith and the Curnow-Boyd communications. Thus, in connection with oral argument, the District Judge stated (R. 275) that this Court's remand

> "was not for the purpose of considering whether or not the contact of the witness Satterly with a juror was harmful or not. They have remanded it for the purpose of determining whether the contact of the FBI agent to the juror was harmful. That is the way the opinion reads to me."

Similarly, he stated that the Curnow-Boyd incident was not within the scope of the remand (R. 196). (Respondent's objection to the evidence showing that contact was also based on that ground. R. 195, 199.) While the Court finally admitted the evidence, it repeated that this incident was not within the scope of the remand (R. 197) and indicated that it would be material only if directly related to the Smith-Satterly incident (R. 197-8).

This restricted view of the scope of the hearing is reflected in the fact that the District Judge's opinion (R. 33-39) is devoted almost completely to the FBI contact with Smith, in the constant reference in quotation marks throughout the opinion (six times in a seven-page opinion—R. 33, 34, 38, 39) to the phrase "the incident complained of" (with obvious reference to the FBI contact), and in the casual dismissal of the Smith-Satterly and the Curnow-Boyd incidents.

Moreover, the footnote which constitutes the only mention in the opinion of the Curnow-Boyd incident specifically declares (R. 36) that

> "* * * it had not the slightest bearing upon the subject matter of the hearing. * * *"

A reading of this Court's opinion in ordering the hearing clearly shows that the purpose of the hearing was to develop all of the facts and circumstances relating to extraneous contacts with the jurors. The phrase, "the incident complained of", which the District Judge's opinion quotes so frequently, was used in this Court's opinion interchangeably with the plural word "incidents". And the reference to the effect of an FBI investigation of a juror's conduct was only by way of illustration, not of limitation of the scope of the hearing.

This Court's prior opinion did not, of course, mention the Curnow-Boyd incident, nor was there any reference to the statement of Satterly to Smith that petitioner had received $350,000 "under the table" on the sale of Cal-Neva, but only because the denial of petitioner's request for a hearing had precluded knowledge of those facts at that time. We think it is clear from this Court's opinion that the remand was for the purpose of inquiring into all the extraneous contacts which did in fact occur.

## VIII. CONCLUSION.

The prejudicial effect of these extraneous communications with the jurors, compounded by the unilateral and clandestine investigation conducted by the Government, deprived petitioner of his constitutional right to a trial by an impartial jury under due process of law. Accordingly, the judgment should be set aside and the case remanded for a new trial.

Respectfully submitted,

JOHN R. GOLDEN,
LESLIE C. GILLEN,
SPURGEON AVAKIAN,
*Attorneys for Petitioner.*

LOHSE AND FRY,
*Of Counsel.*
November, 1955.

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# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 156

ELMER E. REMMER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The original opinion of the Court of Appeals (R. 3748–3777) affirming the judgment of conviction is reported at 205 F. 2d 277.[1] The subsequent opinion, findings and order of the District Court (see Appendix, *infra*) pursuant to this Court's mandate are reported at 122 F. Supp. 673.[2] The *per curiam* opinion of the Court of Appeals (Pet.

[1] This Court granted a writ of certiorari (346 U. S. 884) and remanded the case to the District Court for a supplementary hearing (347 U. S. 227, 230).

[2] Following this decision in the District Court this Court restored the case to its docket and remanded the whole record to the Court of Appeals (348 U. S. 904).

App. i–iii) reaffirming the judgment of conviction is reported at 222 F. 2d 720.

## JURISDICTION

The judgment of the Court of Appeals reaffirming petitioner's conviction was entered on May 23, 1955. (Pet. App. iv), and the petition for certiorari was filed June 15, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the evidence introduced by the Government at the supplementary hearing was sufficient to overcome the presumption of prejudice arising from extraneous jury contacts and to justify a finding that they were harmless to petitioner.

2. Whether the trial judge abused his discretion in denying petitioner's pretrial motions to inspect certain of his records held by the Government, in view of petitioner's prior opportunities to examine these records and the belated filing of the motions.

3. Whether the judgment of the Court of Appeals conforms with the principles enunciated by this Court in the so-called net worth cases.

## STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

## STATEMENT

In February 1952, after trial on a six count indictment charging him with wilful attempted evasion of his own and his wife's income taxes for the years 1944, 1945, and 1946 petitioner was convicted under the first four counts, the jury failing to agree as to the counts involving the year 1946 (R. 3–8, 88, 3667). The judgment was affirmed by the Court of Appeals (R. 3748–3777). Upon the Government's confession of error in this Court the case was remanded to the District Court for the sole purpose of holding a hearing concerning an extraneous contact with a juror which had occurred during the trial, and to "determine the circumstances, the impact thereof

upon the jurors and whether or not it was prejudicial." *Remmer* v. *United States*, 347 U. S. 227, 230.

After a three day hearing pursuant to this mandate, the District Court made findings of fact and concluded that the circumstances disclosed were harmless to petitioner and in no way affected the fairness of his trial or the jury's verdict. (See Appendix, *infra*.) Petitioner then sought a rehearing in this Court. This Court restored the case to the docket and remanded the whole record to the Court of Appeals for reconsideration in the light of Judge Goodman's findings and in the light of this Court's decisions in the so-called net worth cases.[4] *Remmer* v. *United States*, 348 U. S. 904. The Court of Appeals, after consideration of supplemental briefs submitted by both parties (Supp. R. 338–339),[5] reaffirmed the judgment of conviction (Pet. App. i–iv).

At the trial the Government demonstrated that petitioner had failed to report all his taxable income for the years involved by evidence of increases in his annual net worth which the jury

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[3] The hearing was conducted by Judge Goodman who had had no prior connection with the case. Judge Foley, who presided at the trial, took the stand and testified at the hearing.

[4] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; and *United States* v. *Calderon*, 348 U. S. 160.

[5] The record of the supplemental proceedings pursuant to this Court's mandate will be designated "Supp. R."

could reasonably conclude resulted from the current income of certain gambling enterprises. The paramount issue was whether the income from a number of alleged partnerships actually belonged entirely to petitioner or had been split between himself and his alleged partners. The evidence to support the jury's verdict was detailed at considerable length in the Government's brief on the merits when the case was first before this Court (No. 304, October Term 1953), and we respectfully refer the Court to that brief for the facts which prove petitioner's complete control of the alleged partnerships (pp. 8–30, 79–81), the unavailability of his personal financial records and the inadequacy of the records of the alleged partnerships (pp. 44–48), and the accuracy of the starting point (pp. 30–35, 56–65) and the results (pp. 35–36, 65–72) of the Government's net worth computation.

Pursuant to this Court's mandate the Government assumed the burden of proof at the supplemental hearing on the extraneous jury contact and presented every witness who could possibly have had any knowledge of the affair, twenty-six witnesses in all. The evidence to support Judge Goodman's finding that the matter was harmless to petitioner may be summarized as follows:

I. F. Smith, the juror who was eventually elected foreman, had a business and hunting club acquaintance with a man named Satterly (Supp. R. 51–52, 59–60, 111–112). Satterly had a repu-

tation for joviality[6] and his relationship with Smith involved a great deal of good-natured banter (Supp. R. 51–52, 59, 89, 116, 125). For some years prior to the trial Satterly had been employed in gambling clubs in Reno (Supp. R. 111). He was acquainted with petitioner only by sight (Supp. R. 112).

One evening, after petitioner's trial had been in progress for several days, Satterly and his wife, who were about to move to Idaho,[7] visited at the Smith home for about forty-five minutes to an hour (Supp. R. 50, 73, 112–114). The purpose of the call was to arrange the transfer of an automobile insurance policy which Smith had previously sold to Satterly (Supp. R. 50, 113). While the wives conversed at one end of the room, the husbands discussed their business and then turned to talk of guns and hunting (Supp. R. 50–53, 72, 113). At some point during the course of this subsequent social conversation, Satterly mentioned the fact that Smith was a member of the jury trying petitioner and made substantially the following comment: "I know Bones Remmer very well. He sold Cal-Neva for 850 thousand dollars. He really got about $350,000 under the table, and has about $300,000 he daresn't touch.

[6] Mrs. Satterly testified "My husband always joked" (Supp. R. 125).

[7] They were already packed for the trip and actually left Reno permanently the following morning (Supp. R. 110, 116–117, 126).

Why don't you make a deal with Bones?" (Supp. R. 52–53, 67, 72, 155, 167).[8] Smith immediately said that since he was a member of the jury he could not discuss anything in connection with petitioner (Supp. R. 52–53). Satterly's remark was made in the same friendly manner in which he had been speaking all evening, and he laughed at Smith's answer and said no more about the case for the remainder of the visit[9] (Supp. R. 52–53, 94).

Smith felt reasonably certain that Satterly had spoken in jest (Supp. R. 89, 220). However, he was not absolutely certain,[9] and the jury had been repeatedly warned by the trial judge to report any attempt to discuss the case with them

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[8] Satterly himself testified that he could not recall having made any such remarks, and that if he had done so "it was all in fun" (Supp. R. 118–119). He testified, however, that in the course of the conversation he said that he would postpone his departure from Reno a few days to go hunting if Smith could get off the jury, and that Smith simply answered that he could not discuss the trial (Supp. R. 113, 117–118). Mrs. Satterly overheard something similar to this and thought it was a joke (Supp. R. 126). Mrs. Smith heard her husband raise his voice and say that he could not discuss the trial and heard Satterly laugh in reply (Supp. R. 128).

[9] Smith had some slight suspicion that Satterly might have been feeling him out, and that he might have gone to petitioner if Smith had indicated any interest. Smith stated that if he had been sure that this was Satterly's purpose, he would have felt that petitioner was being exploited, and he would, if anything, have been influenced in petitioner's favor. (Supp. R. 95–98, 155.)

(Supp. R. 53, 89). Accordingly, after thinking about the occurrence for a day or so, he reported it to Judge Foley. The judge agreed that Satterly appeared to be joking, but he warned Smith not to let the affair influence him against petitioner "because it could very well be that some busybody might be trying to work his way into the case somewhere, and without any knowledge on the part of Mr. Remmer at all". (Supp. R. 53–57, 133–135.) The judge then called the incident to the attention of one of the prosecutors and told him that, while he believed that Satterly was joking, he felt that the possibility of an attempt to influence a juror should be investigated (Supp. R. 135–137, 226–228).

Thereafter, Smith was interviewed by an agent of the Federal Bureau of Investigation, who had been instructed to investigate the conduct of Satterly (Supp. R. 151–152, 229–231). The agent carefully explained the purpose of his investigation, and he said nothing to indicate that Smith himself was under any suspicion (Supp. R. 60, 152, 169–170). Smith repeated in detail the story he had previously related to Judge Foley and told the agent everything he knew about Satterly (Supp. R. 57–60, 152–156, 166–168). The incident was never mentioned to Smith again for the duration of the trial and he dismissed it from his mind completely until after the verdict

has been returned" (Supp. R. 61, 90, 106–108).

Smith did not inform anyone else of Satterly's remark, nor did he mention his interviews with the judge and the FBI agent, until after the trial was over (Supp. R. 61, 78, 83, 98, 107). The other eleven jurors and the two alternates testified unanimously that he had never mentioned the incident to them during the trial (Supp. R. 172, 180, 184, 182, 183, 192, 193, 195, 213, 214, 215, 217, 219). Smith testified that his verdict was in no way affected by his conversation with Satterly[11] (Supp. R. 61, 65).

The jury deliberated, with Smith as foreman, for two and a half days (Supp. R. 179). After they had returned their verdict and had been dismissed, Smith was approached by newspaper reporters and asked about his conversation with Satterly. It was the farthest thing from his mind at the time and he was dumfounded. (Supp. R. 65–66, 101–102.) That evening while

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[10] On the basis of the agent's report it was concluded that no action against Satterly was warranted (Supp. R. 157–158, 230).

[11] Counsel for petitioner objected to this expression of opinion by the juror as to whether his verdict had been affected, and the judge stated that he would not rest his decision upon such opinion evidence (Supp. R. 36–37, 61–65; see Appendix, *infra*, p. 23). Thereafter petitioner himself introduced in evidence two affidavits signed by Smith in which he stated emphatically that his judgment in the case had not been influenced either by Satterly's comments, or by his conversation with Judge Foley, or by his interview with the FBI agent (Supp. R. 90–96).

he was riding home with two fellow jurors, Tinkham and Mrs. Mack, Smith mentioned the Satterly incident during a general conversation about the trial and passed it off as probably a joke, but said that he had reported it to Judge Foley. There were general expressions of relief at the conclusion of the three months of trial, and Tinkham particularly remarked that he had been under strain and pressure because he operated a one-man business. (Supp. R. 183–187.) Mrs. Mack testified that Smith drove her home after Tinkham had left them, and that just as they finally parted Smith told her that he wanted to thank her for working with him on the jury because he had been under pressure, and said that some day he would tell her why he was so interested (Supp. R. 174–178). Smith denied this (Supp. R. 103).

Another juror, Richard Curnow, testified that, as he was leaving the courthouse one day during the trial, one of the guards at the door asked him whether he had heard any discussion among the jury indicating that one of the panel had been approached, to which he replied that he had not. He believed the guard was Deputy Marshal Boyd whom he had previously known.[12] (Supp. R. 195–209.) Boyd denied asking such a question (Supp.

[12] Petitioner is mistaken in stating (Pet. 16) that Curnow at first denied that he knew the name of the deputy marshal, but later identified him as Boyd. (See Supp. R. 203, 208–209.)

R. 248–255). Counsel for petitioner introduced an affidavit of Curnow in which he swore that the incident had not influenced his decision (Supp. R. 209–211), and one of petitioner's counsel testified that Curnow had made an oral statement to the same effect to him. (Supp. R. 265–266). Judge Goodman found that the incident did not in any way affect the jury's verdict. (See Appendix, *infra*, p. 23.)

## ARGUMENT

1. In remanding this case to the District Court for a supplementary hearing this Court held that any irregular private communication with a juror during a trial is presumptively prejudicial. "The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." After pointing out that it could not be determined upon the record then before the Court whether what had occurred was harmful or harmless, the opinion directed the District Court to hold a hearing to determine whether or not it was prejudicial to petitioner. *Remmer* v. *United States, supra*, pp. 227, 229–230.

That hearing has now been held. The Government assumed the burden of proof and presented twenty-six witnesses, all who could possibly have had any knowledge of the affair. Petitioner had full opportunity for cross-examination and for

presentation of additional evidence himself. Contrary to petitioner's assertions (Pet. 26–27), full scope was allowed for development of all the facts relative to Smith's conversations with Satterly, Judge Foley, and the FBI agent, and to Curnow's conversation with the deputy marshal. And Judge Goodman found, after listening to three days of testimony and argument, that none of the circumstances developed in any way affected the jury's verdict or were harmful to petitioner.

There is no merit in any of the issues raised by petitioner (Pet. 3–5, 24–32) in this connection. Satterly's reputation as a joker, the bantering relationship between him and Smith, and the circumstances in which Satterly's remark was made (during a social conversation after a legitimate business transaction, with no change of tone, in the presence of the two wives, and with Satterly on the point of leaving the vicinity permanently), all these confirm the reasonableness of Smith's conclusion that Satterly was jesting as usual. But since the juror had some lingering doubt he prudently informed Judge Foley who advised him to treat the occurrence as a joke and cautioned him not to let it influence him against petitioner. The FBI agent made it clear to Smith that he was investigating Satterly and said nothing to indicate that there was any suspicion of Smith. None of the other jurors was aware of the incident, and it dropped so completely out of

Smith's mind that he was surprised when reporters asked him about it after the verdict. None of his subsequent comments to fellow jurors indicates that he regarded it as serious. His thanks to Mrs. Mack and his statement that he had been under pressure were, if Mrs. Mack was not confused in her recollection,[13] simply the natural reaction of the foreman of the jury, as Judge Goodman points out (Appendix, *infra*, p. 24), to the strain of three months of trial and two and a half days of deliberation. The evidence outlined in the Statement above amply supports Judge Goodman's conclusion that Smith was "a forthright and honest man who took his duties as a juror with utmost seriousness and with a full understanding of his responsibility," and that none of the circumstances developed had any effect upon his judgment" (Appendix, *infra*, pp. 25–26).

The Curnow-Boyd incident was fully canvassed

[13] As has been noted (*supra*, p. 10) junior Tinkham had spoken of the strain and pressure on him during the ride home with Smith and Mrs. Mack.

[14] The added detail of the under-the-table payment supposedly received by petitioner from the sale of Cal-Neva, developed during the testimony of the FBI agent after Smith had left the stand (Supp. R. 155, 167), added nothing essential to Smith's original testimony that Satterly's remark was that he ought to make a deal with petitioner (Supp. R. 52, 67–70, 87–88). If petitioner felt that this was important he could have had Smith recalled to the stand for further cross-examination. He did not even suggest this during the proceedings before Judge Goodman.

at the hearing and Judge Goodman's conclusion was that it did not "in any way affect the jury's verdict" (Appendix, *infra*, p. 23).

There is no merit to the contention (Pet. 24–26) that Judge Goodman should have determined, not only that there was no actual harm to petitioner, but whether the evidence precluded all reasonable possibility of harm. Any such *reasonable* possibility was dispelled by the finding of actual harmlessness. It is the reasonable possibility of prejudice inherent in such irregular contacts which gives rise to the presumption of harm and imposes upon the Government the heavy burden of establishing the contrary. This Court remanded the case to the District Court to determine whether the contact was harmless and Judge Goodman's finding is fully supported by the evidence.[15]

2. Petitioner's contention (Pet. 5–6, 32–37) that he was denied the right to inspect, prior to trial, certain of his records held by the Government was not within the terms either of this Court's order remanding the case to the District Court for a hearing on the extraneous jury contact, or of this Court's subsequent order remanding the whole record to the Court of Appeals. (See *supra*,

[15] The facts of *Stone* v. *United States*, 143 F. 2d 70, 76–78 (C. A. 6th), upon which petitioner relies (Pet. 25–26), are vastly different from those in the present case. The juror in that case was twice approached and he had good reason to believe that a serious attempt had been made to bribe him. Furthermore, it was forcibly brought to the attention of all the other jurors that some such incident had happened.

pp. 3–4.) This issue was treated at considerable length in the Government's brief on the merits when the case was here previously (No. 304, October Term 1953) and the Court is respectfully referred to pages 81 to 92 of that brief. Suffice it to say here that petitioner's accountants and attorneys had ample opportunity to examine the records in question prior to trial, and actually availed themselves of those opportunities. The trial judge acted within the limits of sound discretion in denying petitioner's belated motions as purely dilatory, and there was nothing to indicate that the defense was deprived of any document which would have been useful to it at the trial.[16]

3. Petitioner's present attacks upon the validity of the net worth proof (Pet. 6–8, 19–24, 37–50) have for the most part been answered at length in the Government's previous brief on the merits (pp. 56–81), which demonstrates that the evidence of unreported income in this case fully satisfied the requirements which have been set forth in the *Holland*, *Friedberg*, *Smith*, and *Calderon* opinions. That evidence was sufficient to justify the jury in concluding that, whatever the amount of cash petitioner had on hand at the starting point, it was insufficient to account for his excess increases in net worth; that the income

[16] There was no basis for an instruction, as is now contended (Pet. 49–50), permitting the jury to infer that documents favorable to the defense had been withheld by the Government.

slightest doubt, and I so find, that the purpose of the investigation was to determine whether or not *Satterly* had committed an offense.

I am completely satisfied that the incident referred to had no effect whatever upon the judgment, or the integrity or state of mind of the foreman of the jury. After thorough examination, the foreman appeared to me to be a forthright and honest man who took his duties as a juror with the utmost seriousness and with a full understanding of his responsibility.[5] His testimony, plus that of the FBI agent Collister, the Judge of the Court and Assistant U. S. Attorney Thompson, is conclusive that the incident referred to was not in any way concerned with any investigation of the jury as to the conduct of any member of the jury either relating to the trial of the case or otherwise.

Consequently, the court finds that "the incident complained of" was entirely harmless so far as the petitioner was concerned and did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of

[5] One of the jurors, Mrs. Helen Mack, testified that after the verdict, foreman Smith told her that he had been under great pressure. This, it was argued, indicated he had been affected by the Satterly incident. This, however, is a wholly unwarranted inference. The case had been under discussion by the jury for 2½ days. Another juror also stated that he had been under pressure. What was obviously referred to was the strain of several months of trial and days of deliberation, as well as the necessity of attending to the private business of the juror. Since the foreman had relieved his mind by promptly reporting the Satterly incident to the trial judge, it is obvious that he was not referring to it as a "pressure" in his conversation with juror Mack.

the jury, or any of the members of the jury. Thus any presumption of prejudice[6] is conclusively dispelled. The finding aforesaid is one entirely of fact.

It has been argued by the defense that even though the court should determine factually that the defendant was not harmed, nevertheless, there is still doubt, in a legal sense, as to how the foreman's mind was affected by the incident, and therefore the doubt should be resolved in favor of defendant and a new trial granted. But that means that decision would rest on conjecture and hypothesis and not fact. The Supreme Court had the power to decide the question involved as a matter of law. It did not do so. Hence our decision must be on fact.

It has been contended that Satterly's comment to the foreman concerning the defendant's alleged interest in Cal-Neva, was an unauthorized and improper communication to a member of the jury relating to a matter in issue upon the merits of the trial, and hence, since it was not disclosed to the defense, warrants a new trial. While the failure of the trial court to disclose this incident to the defense, can be considered error (*Remmer v. U. S. supra*), yet at most it would be only presumptively prejudicial. And I find that, in fact, under all the circumstances, it was harmless. *U. S.* v. *Compagna*, 146 F. 2d 524, 528.

Ordered, Adjudged and Decreed that the "incident complained of" was harmless to the de-

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[6] *Remmer* v. *U. S.*, 347 U. S. 229; *Mattox* v. *U. S.*, 146 U. S. 140; *Wheaton* v. *U. S.*, 133 F. 2d 522.

fendant Remmer and in no way affected the fairness of his trial or the jury's verdict."

Dated: July 10th, 1954.

/s/ LOUIS E. GOODMAN,
*United States District Judge.*

[Endorsed]: Filed July 10, 1954.

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"Inasmuch as the Supreme Court has not specified, in its mandate, what the court should do if it finds the "incident complained of" harmless, I have followed the procedure of making the foregoing order. I have directed the Clerk of the court to file the foregoing opinion, findings, and order and to forthwith transmit a certified copy thereof to the clerk of the U. S. Supreme Court and furnish a copy thereof to defense counsel and the U. S. Attorney. A true copy of the transcript of the testimony shall be retained by the Clerk to be available to the Supreme Court, if required.

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from the alleged partnerships for the years involved belonged entirely to him and was not split among his alleged partners; and that the so-called "markers," having been treated by petitioner and his associates as cash items, were properly included in the computation.[17] There is no necessity to repeat the arguments here.[18]

No complaint was raised as to the instructions when the case was here before, but petitioner now urges (Pet. 44–49) that the trial court's charge to the jury did not meet the standards prescribed by this Court's opinion in the *Holland* case. The present contention is that the charge did not properly explain either the net worth method or the element of wilfulness, and that specific instructions requested by the defense on these issues were improperly refused.

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[17] As we have pointed out in the previous brief on the merits (p. 72), petitioner's own computation of the net worth increase of the B-R Smoke Shoppe, the only business in which the cash nature of the "markers" is questioned, arrived at substantially the same result as the Government's computation. Furthermore, as was also shown (pp. 65–66, 71–72), this "marker" issue affected only the year 1945.

[18] Petitioner argues (Pet. 20, 40–41) that the starting point lacked a solid foundation because the trial court refused his proffered proof of an additional $10,000 owing to him at that time. But this is a question of the correctness of a ruling excluding defense evidence, rather than a question of the validity of the Government's case. It was not raised when the case was here before, and a brief examination of the record reveals that the proffer did not indicate what materiality it had to the net worth computation (R. 3204–3205, 3207).

At the trial the defense did not object to the charge as given in either of these two respects (R. 3493–3495) and, although objection was made to the failure to give the requested additional instructions, this was simply done by reciting the number of the refused paragraphs and no attempt was made to point out to the trial judge what they would have added to the charge as given (R. 3495–3496). We doubt that the point was properly saved, for such a general objection is hardly sufficient to preserve a specific point. See *Palmer* v. *Hoffman*, 318 U. S. 109, 116–120; *Burns* v. *United States*, 274 U. S. 328, 336; *United States* v. *Furlong*, 194 F. 2d 1, 3 (C. A. 7th), certiorari denied, 343 U. S. 950. The trial court had instructed the jury on the net worth theory and on wilfulness, and the duty rested on petitioner to make it clear what necessary amplifications were contained in his requests.

At any rate there is no merit in petitioner's criticisms. The portion of the charge defining the net worth theory (R. 136–138, 143) compares favorably with that given in the *Holland* case (see No. 37, October Term 1954, R. 207–208), and petitioner's own Requested Instructions 108, 109, and 114 (R. 79–83, 84–85) were incorrect in that they would have required the Government to establish the absolute value of his assets at the starting point. The Government is only required to establish the starting point "with reasonable certainty." (*Holland* v. *United States*, *supra*, p.

132) and it does "not have to prove the exact amounts of unreported income * * *" (*United States* v. *Johnson*, 319 U. S. 503, 517). As to the element of wilfulness, the substance of petitioner's Requested Instructions 69, 75, 77, 78, 79, 80, 81, 82, 88, 89, and 90 (R. 73–79) was given in the court's Instruction No. 9 (R. 133), in which the jury was warned to disregard bona fide mistakes, and in Instruction No. 11 (R. 134-135) in which the court said:

> There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.
>
> The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.
>
> If you find from the evidence beyond a reasonable doubt that the defendant did consciously, knowingly, and intentionally fail to report or cause to be reported his true income and thereby the Government was cheated or defrauded of taxes, you

Cases—Continued Page

*Stone* v. *United States*, 113 F. 2d 70 ..... 28, 29, 30
*United States* v. *Calderon*, 348 U. S. 160 ..... 4
*United States* v. *Campagna*, 146 F. 2d 524, certiorari denied, 324 U. S. 867, rehearing denied, 325 U. S. 892 ..... 26
*United States* v. *Johnson*, 319 U. S. 503 ..... 32
*United States* v. *Marine*, 84 F. Supp. 785 ..... 28, 29
*Wheaton* v. *United States*, 133 F. 2d 522 ..... 25, 30

> may find that he intended to evade the tax. However, you must not convict the defendant unless the evidence has convinced you beyond a reasonable doubt that he knew he was doing wrong.

Thus the jury was clearly told what type of intent it must find in order to convict petitioner. Whatever might be the effect of the trial court's additional ambiguous definition of the word "wilful" (Pet. 48), if used as the sole instruction on the element of wilfulness, it is unnecessary to decide here. Petitioner should have given the trial court the opportunity to resolve any possible doubt in the minds of the jury by a proper objection.

## CONCLUSION

For the reasons stated in the Government's previous brief on the merits as well as those appearing above, it is submitted that the decision of the court below is correct and that no reason is presented for further review. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
*Solicitor General.*
H. BRIAN HOLLAND,
*Assistant Attorney General.*
JOSEPH M. HOWARD,
*Attorney, Department of Justice,*
*Washington 25, D. C.*

AUGUST 1955.

# In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 156

ELMER F. REMMER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The original opinion of the Court of Appeals (O. R. 3748–3777)[1] affirming the judgment of conviction is reported at 205 F. 2d 277.[2] The subsequent opinion, findings and order of the District Court (R. 33–39) pursuant to this Court's

[1] References to the original record filed in this Court when the case was here before (*Remmer* v. *United States*, No. 304, October Term, 1953) will be designated "O. R." References to the record of the present proceeding will be designated "R."

[2] This Court granted a writ of certiorari (346 U. S. 884) and remanded the case to the District Court for a supplementary hearing (347 U. S. 227, 230).

# APPENDIX

In the United States District Court for the District of Nevada

No. 12177

THE UNITED STATES OF AMERICA, PLAINTIFF

*v.*

ELMER F. REMMER, DEFENDANT

Pursuant to the directions of the Supreme Court, 347 U. S. 230, a hearing was had in the above entitled court at its court room in Carson City, Nevada, on June 7, 8, and 9, 1954, for the purpose of determining whether or not the "incident complained of," and described in the opinion of the Supreme Court, 347 U. S. 228, was harmful to the petitioner, i. e., defendant Remmer.

The government assumed the burden of proceeding with the evidence. The court heard the testimony of 27 witnesses:

12 members of the jury.

2 alternates on the jury.

The person who communicated with the foreman of the jury during the trial of the case.

The Trial Judge.

The secretary to the Trial Judge.

5 government attorneys who participated in the conduct of the case.

The FBI agent who investigated the "incident complained of."

mandate are reported at 122 F. Supp. 673. The *per curiam* opinion of the Court of Appeals (R. 339–340) reaffirming the judgment of conviction is reported at 222 F. 2d 720.

## JURISDICTION

The judgment of the Court of Appeals reaffirming petitioner's conviction was entered on May 23, 1955 (R. 341). The petition for a writ of certiorari was filed June 15, 1955, and was granted (limited to questions presented under III A of the petition) on October 10, 1955 (R. 341). The jurisdiction of this Court rests upon 28 U. S. C., Section 1254 (1).

## QUESTIONS PRESENTED

1. Whether the District Court correctly construed and applied the law, announced in this Court's previous opinion in this case, as to the presumption of prejudice which attaches where there is an extraneous contact with a juror during the trial about a matter pending before the jury.

2. Whether the District Court abused its discretion in finding and concluding from the evidence adduced at the hearing that the extraneous jury contacts were harmless to petitioner and that the presumption of prejudice arising from such contacts was thus affirmatively rebutted.

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Following this decision in the District Court, this Court restored the case to its docket and remanded the whole record to the Court of Appeals (348 U. S. 904).

A deputy U. S. Marshal who, among other deputies, had charge of the jury during the trial.

The wife of the person who communicated with the foreman of the jury.

The wife of the foreman of the jury.

One of the attorneys for the defendant.

Since the Supreme Court empowered this court, if it found that "the incident complained of" was harmful to the petitioner, to grant a new trial, the court proceeded as if it were hearing a motion for a new trial based upon the ground that "the incident complained of" was harmful to the defendant. (This is the hearing that the Supreme Court declared should have been held in the first instance.)

I find that what occurred was as follows:

On or about December 20, 1951, after the trial of *U. S.* v. *Remmer* had been in progress approximately three weeks, one James H. Satterly visited the home of Irwin J. Smith, foreman of the jury, for the purpose of conducting some insurance business with Smith, who was an insurance agent or broker. As well, Satterly had a social acquaintance with the foreman as a fellow hunter. During the course of the visit at the foreman's home, Satterly made substantially the following comment:

> I know Bones Remmer very well. He sold Cal-Neva for $850,000 and really got about $300,000 under the table which he daresn't touch. Why don't you make a deal with him?

Foreman Smith interrupted Satterly and in substance replied that he was a member of the jury and that he had been instructed by the court

## STATEMENT

On April 9, 1951, an indictment in six counts was filed against petitioner in the United States District Court for the District of Nevada, charging violations of Section 145 (b) of the Internal Revenue Code of 1939. The first and second counts alleged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself and his wife for the year 1944, in the amount of $27,379.08. The third and fourth counts charged evasion of his own and his wife's income taxes for the year 1945, in the amount of $11,090.34. The fifth and sixth counts charged similar evasion for the year 1946, in the amount of $117,129.62. (O. R. 3–8.) After a jury trial which lasted approximately three months, from November 28, 1951, until February 22, 1952, petitioner was convicted on the first four counts; the jury failed to agree as to the counts involving the year 1946 (O. R. 85, 3667). On February 29, 1952, he was sentenced to imprisonment for five years and was fined $5,000 on each of the first four counts. The terms of imprisonment were made to run concurrently, but the fines were cumulative (O. R. 89–91). The conviction was affirmed unanimously by the Court of Appeals for the Ninth Circuit (O. R. 3748–3777).

This Court granted a writ of certiorari (346 U. S. 884). Upon the Government's confession of error on the failure of the trial court to grant

not to discuss the case with anyone. No more was said on the subject.

Foreman Smith regarded the comment of Satterly as being jocular, but, later, after turning the incident over in his mind, and being mindful of the admonition of the court,[1] reported it to the trial judge, the Honorable Roger T. Foley on December 22nd. Thereupon Judge Foley notified the U. S. Attorney's office and Assistant U. S. Attorney Bruce R. Thompson visited Judge Foley. The Judge and Mr. Thompson discussed the incident and Mr. Thompson decided that the incident should be investigated with the view of determining whether Satterly had committed an offense against the laws of the United States.[2] To that end, and for that purpose, FBI agent T. Hiram Collister was directed to make an investigation. Mr. Collister then interviewed Foreman Smith, advising him at the time that he, Smith, was not being investigated, but that the FBI was making an investigation to determine whether or not there had been a violation of law by Satterly. Information concerning Satterly was given by foreman Smith to agent Collister. The agent further made inquiries as to the criminal and credit record of Satterly. The FBI was then unable to locate Satterly, who had departed for the northwest. Subsequently, the FBI returned a report to the U. S. Attorney, in substance con-

[1] At each recess, the trial judge admonished the jury "not to permit anyone to talk to you about the case * * * if anyone should persist in talking to you about the case, after you have informed them that you are a member of the venire, you report that individual to the court."

[2] 18 U. S. C. § 1503.

taining the foregoing facts. The U. S. Attorney's office then determined that there was not sufficient evidence upon which to take proceedings against Satterly. None of the foregoing matters were, at any time, communicated to any member of the jury or to the two alternates, and none of the jurors or alternates learned of the foregoing events until after their verdict was rendered. Satterly denied that he had made the comment to foreman Smith.

The foreman of the jury testified that the events described in no way affected his state of mind or his vote in arriving at the verdict.[4]

It is not true that the FBI agent was sent to investigate the foreman of the jury as to his conduct, as was conjectured in the opinion of the Supreme Court (p. 229). There is not the

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[3] One of the jurors testified that during the trial one of the deputy marshals who had charge of the jury inquired of him whether he knew or had heard of any outsider talking to a juror about the case. The juror thought that it was deputy marshal Boyd, but was uncertain about it and conceded that it might have been another deputy. Deputy Marshal Boyd denied that any such conversation had occurred. Thus the testimony in this regard is most vague, but even if some such event occurred, it had not the slightest bearing upon the subject matter of the hearing, nor did it in any way affect the jury's verdict.

[4] I permitted the witness to testify that the Satterly incident did not prejudice his verdict. There seems to be a division of authority as to whether such opinion testimony is admissible. (See *Mattox* v. *U. S.*, 146 U. S. 140; *Ryan* v. *U. S.*, 191 F. 2d 779, 781; *U. S.* v. *Rakes*, 74 F. S. 615; *Higgins* v. *U. S.*, 160 F. 2d 222; *Stone* v. *U. S.*, 113 F. 2d 70.) Being mindful of this state of the law, I stated, at the time the answer of the witness was admitted, that I would not base decision upon such opinion testimony.

close personal friends, but was based upon business dealings and chance meetings at a hunting club of which both were members. (R. 51, 59, 111–112). Satterly had lived in Reno for about six years during which time he was employed as a "dealer" in gambling clubs (R. 110–111). He had purchased a house and automobile insurance through Smith (R. 51, 111). Smith was familiar with his background and knew that he had served a term of imprisonment in Oregon (R. 168). Smith and Satterly were hunting and fishing enthusiasts. When they met they usually engaged in banter about their respective abilities as hunters. (R. 51–52, 59, 111–112, 115–116.) Satterly, in particular, had a reputation as a joker[5] (R. 59, 89, 125).

The purpose of Satterly's visit to the Smith home was to arrange the transfer of an automobile insurance policy which he had purchased from Smith (R. 50, 71, 113, 128, 154). Satterly's car had been wrecked in an accident. He had purchased another car and wanted his insurance transferred before departing on a trip to the Northwest (R. 71–72). Satterly and his wife were moving from Reno, permanently. They were packed and ready for the trip when they called at the Smith home. (R. 53, 116–117.) They

[5] Petitioner's characterization of Satterly as a "personal friend" of Smith's (Pet. Br. 7) is correct only if taken in the very limited sense described in the text.

[5] His wife testified, "My husband always joked" (R. 125).

actually left Reno the next day for Idaho and eventually Oregon (R. 110, 117). Smith knew of their plans. Sometime prior to the visit, Satterly told Smith he was leaving Reno and listed his house for sale with Smith. Smith was unsuccessful in his efforts to sell the house, but it was sold by another real estate firm. At Satterly's request, Smith reviewed the sale before it was completed. (R. 59–60, 115–116.)

The Satterly visit lasted approximately forty-five minutes (R. 73, 114, 130). The conversation took place in the living room of the Smith home. Smith and Satterly conversed at one end of the room while their wives chatted at the other end (R. 50–51, 114, 128). First, Smith and Satterly discussed the latter's insurance problem, his pending departure from Reno; and his immediate plans for the future. The conversation then turned to talk of guns and hunting. (R. 50–53, 72, 113, 154–155, 166–167.) During the course of this latter conversation about hunting, Satterly made reference to the fact that Smith was a member of the jury trying petitioner (R. 72, 113, 167). Smith replied, "Yes, I'm busy every day" (R. 155, 167). Satterly, without any change in the tone of his conversation (R. 52), then made a remark along the following lines (R. 165, 167):*

* At the hearing, Smith could not recall Satterly's exact words (R. 52–53, 67). The summary is from the notes which F. B. I. Agent Callister made when he interviewed Smith on

> I know Bones Remmer very well. He sold Cal-Neva Club for $850,000 on top of table—believe he got $350,000 under the table—Has about $300,000 that he daren't touch—Why don't you make a deal with Bones?

Smith immediately informed Satterly, in a raised voice (R. 128), that since he was a member of the jury he could not discuss anything in connection with petitioner (R. 52–53, 71, 155, 167). Satterly laughed at Smith's reply (R. 128), and said no more about the case (R. 52–53, 155, 165). The conversation turned back to the insurance matter or hunting, and after a few minutes, the Satterlys left (R. 53).

At the hearing, Satterly could not recall having made the remark in question.[8] He testified that if he made the remark "it was all in fun" (R. 118–119). He did recall saying to Smith that if Smith "got off the case in a few days [he] would stay over and go hunting with him" (R. 117). Neither of the wives, who were sitting at the other end of the room, heard the details of the conversation between Smith and Satterly (R. 125–126, 128–129). Mrs. Satterly testified that she had some recollection of her husband say-

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December 22, 1951, as discussed hereafter (R. 167), Smith did not profess to be quoting Satterly exactly to Agent Callister (R. 165).

[8] Petitioner's statement (Pet. Br. 11) that Satterly "categorically denied at the hearing that the incident described by Smith had ever occurred" is inaccurate.

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No. 156

# In the Supreme Court of the United States

OCTOBER TERM, 1955

ELMER F. HEMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF
Solicitor General

H. BRIAN HOLLAND
Assistant Attorney General

JOHN S. BOWLES
Assistant to the Solicitor General

ROBERT S. ERDAHL
JOHN F. DAVIS
Attorneys

Department of Justice, Washington 25, D. C.

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a hearing with respect to alleged extraneous contacts with a juror which had occurred during the trial, the case was remanded to the District Court with directions to hold a hearing to determine "the circumstances [of the incident], the impact thereof upon the juror, and whether or not it was prejudicial." *Remmer* v. *United States*, 347 U. S. 227, 230.

After a three-day hearing, held pursuant to this Court's mandate, at which Judge Louis E. Goodman presided,[4] the District Court made findings of fact that the extraneous contacts disclosed were harmless to petitioner (R. 36, 37–39), and concluded that they in no way affected the fairness of the trial or the verdict of the jury (R. 39).

Petitioner then filed with this Court a petition for rehearing which was granted. The case was restored to the docket and the entire record, including the findings and order of Judge Goodman, was remanded to the Court of Appeals for reconsideration in the light of this Court's intervening decisions in the so-called "net worth" cases,[5] and in the light of Judge Goodman's findings and order (348 U. S. 904).

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[4] Judge Goodman had no previous association with the case and presided at the hearing by special designation. Judge Roger T. Foley, who presided at the trial, testified at the hearing.

[5] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; and *United States* v. *Calderon*, 348 U. S. 160.

The Court of Appeals, after consideration of supplemental briefs submitted by both parties, reaffirmed the judgment of conviction (R. 339-340). This Court granted a writ of certiorari limited to the questions presented under III A of the petition for the writ, namely, questions relating to the extraneous jury contacts (350 U. S. 820).

In accordance with the opinion and mandate of this Court (347 U. S. 227), the Government assumed the burden of proof at the supplemental hearing on the matter of the extraneous jury contacts. It adduced the testimony of every person who could possibly have any knowledge of the matter, including all twelve jurors and the two alternates, members of the prosecution staff, the trial judge, and the agent of the Federal Bureau of Investigation who conducted the investigation referred to hereafter.

The evidence to support Judge Goodman's findings that the contacts were harmless to petitioner may be summarized as follows:

Irving J. Smith, a real estate and insurance broker in Reno, Nevada, for 19 years (R. 49), was foreman of the jury which tried petitioner (R. 61). On Tuesday evening, December 18, 1951 (R. 154, 166), after the trial had been in progress for three weeks, James A. Satterly visited the Smith home accompanied by his wife (R. 50, 112, 154, 166). Smith was well acquainted with Satterly and had known him for about five years. The relationship between the two was not that of

ing to Smith: "When you have finished with whatever you are doing, we could go hunting". She added that she thought the hunting suggestion was "more or less a joke" (R. 126). She testified that her husband "always joked" (R. 125). Mrs. Smith did not hear Satterly's remark but she did hear her husband inform Satterly, in a raised voice which attracted her attention, that he could not discuss the trial. She then heard Satterly laugh."[10] (R. 128.)

Smith did not regard Satterly's remark as a serious proposal (R. 96–98). He thought the remark was made in jest (R. 53–54, 73–74, 89, 155) because "Satterly was in the habit of joking quite a lot" (R. 89). But he was not entirely certain of Satterly's intentions (R. 89, 222), and he was troubled about whether he should report the incident to Judge Foley in view of the latter's repeated instructions to the jury. At each recess, Judge Foley instructed the jury not to permit anyone to discuss the case with them and to report to the court any individual who persisted in discussing the case after having been informed that they were members of the jury. Smith reasoned that the incident did not come within the scope of the Judge's instructions, since Satterly did not persist in discussing the case. Yet, due to the nature of the remark, he felt that

[10] She did not question her husband about it during the trial because her husband did not discuss the case with her (R. 130).

he should have some counsel, and Judge Foley was the only one with whom he properly could discuss it. After turning the incident over in his mind for a day, he decided to report it to the judge. (R. 53–54, 73–74, 89.)

On Thursday, December 20, 1951, during the morning recess in the trial, Smith related the incident to Judge Foley in the latter's chambers (R. 133). He quoted Satterly as having made substantially the following comment (R. 134):

> I know Bones Remmer. You are a member of the jury. Why don't you make a deal with him?

Smith informed Judge Foley that he thought Satterly had made the remark in jest (R. 134). After inquiring into the details of the conversation, Judge Foley agreed with Smith that the remark "sounded like a joke," and he instructed Smith to regard it as such (R. 56, 81, 134). He also instructed Smith that, even if Satterly was not joking, Smith should not let the incident influence him against the petitioner "because it could very well be that some busybody might be trying to work his way into the case somewhere, and without any knowledge on the part of Mr. Remmer" (R. 134). Judge Foley was satisfied, after discussing the incident with Smith, that it had no unfavorable impact upon Smith (R. 231).

Although Judge Foley believed that Satterly's remark was not intended as a serious proposal, he thought that Satterly should be investigated

in order to determine whether, in fact, he had any connection with the defense or any ulterior purpose in making the comment. Accordingly, he summoned a member of the prosecution staff, Bruce R. Thompson, to his chambers, informed him of the incident and requested an investigation of Satterly's background and associations. He did not inform defense counsel of the incident.[1] (R. 135–137, 226–228.)

The following morning, Friday, December 21, 1951, Thompson contacted T. Hiram Callister, a Special Agent of the Federal Bureau of Investigation, and after informing him of the incident and of Judge Foley's request he asked that an investigation be made of Satterly (R. 151, 229). Callister sought and received authorization to conduct whatever investigation Thompson desired. Thompson instructed Callister to obtain some background information on Satterly and to interview him. (R. 151, 229.) He told Callister to interview Smith as a starting point (R. 233), and after obtaining what information he could on Satterly, to report back to him (R. 151).

On Saturday morning, December 22, 1951, Callister interviewed Smith in the latter's office (R.

[1] Judge Foley did not inform the defense because he felt that to do so would jeopardize the investigation in the event Satterly was acting in concert with the defense. Although he did not believe that a serious attempt had been made to influence a juror or that Satterly was connected with the defense, he reasoned that both possibilities had to be taken into account. (R. 136–137.)

152). At the outset, he advised Smith of the purpose of the interview and of the investigation which he was conducting. He was careful to explain to Smith that it was Satterly's conduct which was under investigation. (R. 152–153, 169–170.) He then asked Smith about the nature of his relationship with Satterly and the details of the conversation in question. He also asked for any information which Smith could furnish concerning Satterly. (R. 57–60, 152–156.)

In the course of the interview, Callister asked Smith if he thought Satterly had made a serious proposal, and Smith replied that "he did not consider it [as] such". Smith added that "he felt that Mr. Satterly might have been feeling him out," but that he did not believe Satterly had been in contact with Remmer. He pointed to the possibility that if his reception had been cordial Satterly might have contacted Remmer and might have considered setting up a deal. (R. 155.) Smith also told Callister that he thought over the incident and at first was not going to report it "because he thought it was a joke" and that he decided to report it "because the Judge had been so specific in instructing them" (R. 155). Callister made notes of the interview with Smith (R. 166–168).

Callister could not locate Satterly for questioning. His inquiries disclosed that Satterly had left the area before the investigation was requested. Callister then checked Satterly's credit and criminal record. On December 24, 1951, Cal-

lister reported the results of the investigation to Thompson and asked Thompson if he wanted Satterly located and interviewed or any further investigation made. Thompson requested him to consult Judge Foley on the matter. (R. 157–158, 232–233.)

Callister related the results of the investigation to Judge Foley on January 4, 1952,[*] and Judge Foley told him that no further investigation was necessary. On March 10, 1952, Thompson reviewed the matter with Callister and advised him that no action against Satterly was contemplated (R. 158, 230). The F. B. I. did not interview Satterly until a month prior to the supplemental hearing in 1954 (R. 120, 161).

Smith did not inform anyone except Judge Foley and Callister, of Satterly's remark, and he did not mention his interviews with the judge and Callister to anyone until after the return of the verdict (R. 61, 78, 107). The other eleven jurors and the two alternates testified unanimously that Smith had never mentioned the incident to them during the trial (R. 172, 180, 181, 182, 183, 193, 195, 213, 214, 215, 217, 219).

After the interview with Callister, Smith dismissed the incident completely from his mind. It was not brought to his attention again until the trial was over. After the jury had returned their

[*] Callister did not report to Judge Foley earlier because the trial was recessed over the holidays and the judge was not available (R. 158).

verdict and had been discharged, Smith was approached by newspaper reporters as he was leaving the courtroom and questioned about the conversation with Satterly. Smith had so completely removed the matter from his mind that he was "dumbfounded" by the questions. (R. 65–66, 101–102, 106–108.)

On the night the jury returned the verdict, after deliberating for two and a half days (R. 179), Smith rode back to Reno from Carson City with jurors Mack and Tinkham.[2] During the ride home they engaged in a general conversation about the trial. They agreed that the long trial had been a "strain", and there was a general expression of relief that it was over. (R. 184.) Juror Parker had in fact fainted after the verdict was returned and the jury was leaving the courtroom (R. 180). In the course of the conversation, Smith mentioned, in a casual way and without going into any details, that it was possible he had been approached during the trial but that he had reported the matter to the judge and had passed it off as a joke (R. 183–187). Upon reaching Reno, Smith, who had left his car at Tinkham's house, drove Mrs. Mack home. Mrs. Mack testified that when they arrived at her home she thanked Smith for the ride, and that he replied in substance that he wanted to thank her for

[2] During the trial, Smith, Mack and Tinkham, plus alternate juror Morris, formed a car pool for the trips to and from Carson City and Reno (R. 98, 102–103, 172).

working with him on the jury because he had been under pressure; he added that someday he would get together with her and discuss it. (R. 174–178.) Smith denied that he made the comments attributed to him by Mrs. Mack (R. 103).

At the hearing, Smith testified, over petitioner's objections, that he was not in any way prejudiced against the petitioner by the incident in question. Judge Goodman, in admitting the testimony, pointedly observed that he was not going "to decide this matter on the basis of statements of opinion of any of the witnesses." (R. 61–65.) Smith also testified, in response to questions by counsel for petitioner, that had he considered Satterly's remark as a serious proposal "it might have influenced me to favor Mr. Remmer" (R. 97). He explained that, had he regarded the matter seriously, he would have thought that Satterly was trying to concoct a deal for himself by exploiting petitioner (R. 97–98). Smith never entertained the thought that Satterly was connected with petitioner (R. 98, 154–155, 260). Satterly in fact did not know petitioner personally (R. 112, 118).

Another juror, Richard J. Curnow, testified that as he was leaving the courthouse one day during the trial,[14] he was asked by deputy marshal

[14] One of petitioner's counsel testified that, when he interviewed Curnow in 1953, the latter fixed the time at about midway in the trial (R. 265).

Hubert Boyd, whom he had known for sometime, whether he had heard any discussion among the jury indicating that one of the panel had been approached, that he replied in the negative and inquired why the question was asked, and that Boyd said "well, he was just curious" [15] (R. 200; 208, 209). Curnow testified further that, at the time, he thought Boyd's question might concern juror Mack, since he recalled seeing her go into the judge's chambers, but that later (the record does not indicate when) he learned that Mrs. Mack had discussed with the judge a matter relating to illness (R. 209–211). Counsel for petitioner offered in evidence a signed statement made by Curnow in March 1954, in which he stated that Boyd's question had no influence on his verdict in the case (R. 210–211). Boyd denied asking Curnow anything about the case. He testified that during the trial he did not hear of any incident involving a juror. (R. 249–252.)

Alternate juror Morris testified to a conversation which he had with Smith about two weeks after the trial at which time the incident in question had become a matter of public knowledge through newspaper stories. Morris related that, in discussing the incident with Smith, the latter told him that he knew Satterly and that Satterly "joked a lot," and that he (Smith) "figured" the

[15] Curnow added that, "I presume he was merely checking, to do his particular job or his duty". Upon motion of the petitioner, this part of the testimony was stricken. (R. 200.)

remark was a joke but "kind of wondered if the man [Satterly] was feeling him out", and that he reported it to the judge because he was uncertain as to what he should do about it. (R. 221–222.)

Judge Goodman made findings of fact that Smith regarded Satterly's remark as jocular (R. 35); that Smith's conduct was not under investigation and that the purpose of the investigation was to determine whether Satterly had committed an offense against the laws of the United States (R. 37); that Satterly's comment to Smith was harmless (R. 38–39); and that the interview between Smith and the F. B. I. agent (Callister) had no effect whatever upon Smith's judgment, integrity or state of mind as a juror (R. 37–38). He concluded that the "incident complained of" was entirely harmless to petitioner and did not have the slightest bearing upon the integrity of the verdict (R. 39). He also concluded that, if deputy marshal Boyd had questioned juror Curnow during the trial as to whether he had heard any discussion among the jury about one of the panel having been approached, the alleged inquiry did not in any way affect the jury's verdict (R. 36).

The hearing pursuant to the mandate of this Court was a full and unrestricted inquiry into all aspects of the matters complained of by petitioner. Judge Goodman advised counsel during the hearing that, due to the nature of the inquiry,

he would not insist upon strict adherence to technical rules of examination and was allowing the parties wide latitude in the presentation of evidence (R. 99–100, 204).

## SUMMARY OF ARGUMENT

### I

When the case was here before, the Court held that any irregular contact with a juror about the matter pending before the jury was presumptively prejudicial. However, the Court also held that the presumption is rebuttable, and that it can be overcome if the Government sustains the heavy burden of proof cast upon it and satisfies the District Court that the contact was in fact harmless to the defendant. The case was, therefore, remanded for a hearing to determine whether the circumstances were harmful. 347 U. S. 227. In so holding, the Court followed a rule to which it had given previous consideration, and one which petitioner himself appeared to urge it to follow.

Now, however, petitioner's argument seems to be that there is what is tantamount to a conclusive presumption of harm whenever it is established that the extraneous communication was of a serious nature. He argues that the District Court should have determined, not whether actual harm resulted to petitioner, but whether the circumstances created a condition from which harm might arise. If this were the rule, this Court would have reversed the conviction as a matter of

law, instead of remanding it for a hearing on the motion for new trial since the facts conceded by the Government before the Court established a reasonable *possibility* of harm.

It is the reasonable possibility of harm inherent in any irregular jury contact of a serious nature which gives rise to the presumption of prejudice which this Court has held to be rebuttable, and the cases on which petitioner relies confuse the basis for the rebuttable presumption with the presumption itself. Here, as we show below, the evidence is sufficient to sustain the Government's burden of proof that the extraneous jury contacts were harmless to petitioner, and the District Court so found. It was not required to decide the matter on the basis of any other measure of proof. In any event, the evidence which sustains the findings that the jury contacts were actually harmless is also sufficiently strong to foreclose any real likelihood of harm to petitioner.

## II

The hearing pursuant to the mandate of this Court was a full and unrestricted inquiry into all matters complained of by the petitioner. The private communications involving juror Smith, *viz.*, his conversation with Satterly, his discussion of the conversation with Judge Foley, and his interview with an F. B. I. agent, were fully probed. The alleged private communication between juror Carnow and deputy marshal Boyd was likewise

thoroughly explored at the hearing. The District Court found as a fact that the matters complained of by the petitioner were entirely harmless and in no way affected the fairness of his trial or the jury's verdict. The finding of the trial court is fully supported by the evidence.

Smith considered Satterly's suggestion that he make a deal with petitioner as a joke and, after discussing it with the trial judge, the latter instructed him to regard it as such. The evidence shows that Smith had good reason to regard the remark as made in jest. He not only regarded Satterly as a banterer but he never entertained the thought that the latter was connected with the defense. Judge Foley also believed the remark was made in jest. However, since he could not be certain of Satterly's intentions and recognized the possibility that the latter may have intended the remark as a serious proposal, he requested an investigation of his background and associations in an effort to determine whether he had any ulterior purpose in making the remark.

Smith was interviewed by an F. B. I. agent in the course of the investigation. The agent carefully explained to Smith that it was Satterly's conduct which was under investigation. There was never any suspicion or suggestion of improper conduct on the part of Smith. The investigation failed to disclose any information indicating that Satterly intended the remark as anything more

than a joke. Since this was Smith's reaction to the comment, and since he had been instructed by the court to regard it as such, there was no need during the trial either to inform Smith of the outcome of the investigation or further to neutralize in his mind any possible prejudicial implications in the remark.

Smith dismissed the incident completely from his mind after discussing it with Judge Foley and the F. B. I. agent, and it was not brought to his attention again until after the return of the verdict, when he was greatly astonished to hear about it. It is clear that he had completely forgotten the incident, and that it could not have influenced his verdict. Hence, the evidence supports the District Court's finding that Satterly's conversation with Smith was harmless to petitioner, and it also forecloses any real possibility that it could have harmed him.

The record also fully supports the District Court's conclusion that the evidence of an alleged conversation during the trial between juror Curnow and deputy marshal Boyd was too vague to form the basis of a finding that Boyd had asked Curnow if he had heard any discussion among the jury indicating that one of the panel had been approached, and also supports the finding that, if the conversation did actually take place, it did not in any way affect the integrity of the verdict. Petitioner's counsel offered in evidence a state-

ment signed by Curnow in which the latter disclaimed any bias or prejudice against petitioner as a result of the alleged conversation. Moreover, it appears that Curnow regarded the alleged query by Boyd as of no significance.

ARGUMENT

In remanding the case, the Court held that any irregular private communication with a juror during a trial raises a rebuttable, but not conclusive, presumption of prejudice, and directed the District Court to hold a hearing to determine whether what had occurred in this case was in fact harmful to petitioner, and if harmful to grant a new trial. *Remmer* v. *United States*, 347 U. S. 227, 229–230.

That hearing has now been held. The Government assumed the burden of proof and presented all witnesses who could possibly have had knowledge of the affair. Petitioner had full opportunity for cross-examination and for presentation of additional evidence. Judge Goodman found, after listening to three days of testimony and argument, that none of the circumstances divulged affected the fairness of the trial or the jury's verdict and that they were thus, in fact, harmless to petitioner. For that reason, he did not grant a new trial.

It is settled that the allowance or refusal of a new trial rests in the sound discretion of the

trial court, and is therefore reviewable only for an abuse of that discretion. *Mattox* v. *United States*, 146 U. S. 140. Thus, the reviewable question presented here is whether the District Court abused its discretion in refusing to grant a new trial.

Petitioner now contends that the District Court misconstrued the rule respecting the rebuttable presumption of prejudice announced in this Court's prior opinion in this case in connection with extraneous jury contacts. He argues that the District Court, in applying this rule, was required to find, not only that there was no actual harm to petitioner, but, in addition, that there was no reasonable possibility of such harm, and that the judge abused his discretion in not basing his decision on the latter measure of proof. As we shall show, this contention of petitioner is without merit, and, in addition, the evidence which affirmatively showed that there was, in fact, no prejudice, also excluded any real likelihood of prejudice, and thus justified the District Court's finding of actual harmlessness. Consequently, the District Court did not abuse its discretion in finding that the extraneous jury contacts were, in fact, harmless, and in holding that the rebuttable presumption of prejudice had been dispelled.

## I

### THE TRIAL COURT CORRECTLY APPLIED THE LAW ANNOUNCED IN THIS COURT'S PRIOR OPINION AS TO THE REBUTTABLE PRESUMPTION OF PREJUDICE RAISED BY EXTRANEOUS JURY CONTACTS

This Court held in its prior opinion in this case, *Remmer* v. *United States*, 347 U. S. 227, 229:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror *was harmless* to the defendant. *Mattox* v. *United States*, 146 U. S. 140, 148–150; *Wheaton* v. *United States*, 133 F. 2d 522, 527. [Emphasis added.]

After observing that it could not be determined from the record then before it whether the incidents which may have occurred were harmful or harmless, the Court remanded the case to the District Court with directions "to hold a hearing to determine whether the incident complained of *was harmful* to the petitioner, and if after hear-

ing it is *found to have been harmful*, to grant a new trial." (Emphasis added.) Clearly, the question framed by the mandate of this Court (R. 335–336) and grounded in its opinion (*supra*, pp. 3–4) was whether the extraneous jury contacts were in fact harmful to the petitioner.

In its opinion remanding the case, this Court reiterated the rule it had previously adopted in *Mattox* v. *United States*, 146 U. S. 140, 147–151. In that case a convicted murderer filed a motion for a new trial with supporting affidavits to show that a bailiff had made prejudicial remarks about the defendant to the jury and had read them a newspaper article about the trial while they were deliberating. The trial judge refused to accept the affidavits and denied the motion without a hearing. This Court said (146 U. S., at 150):

> Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least *until their harmlessness is made to appear*." [Emphasis added.]

Thus, the Court adopted the rule which attaches a *rebuttable* presumption to such "possibly prejudicial" communications and rejected the stricter rule followed by some state courts which had held a conclusive presumption of prejudice to arise upon proof of such a communication. 146 U. S., at 150–151. See *Wheaton* v. *United States*, 133 F. 2d 82 (C. A. 8); *Ryan* v. *United States*, 191

F. 2d 779, 781 (C. A. D. C.), certiorari denied, *sub nom. Duncan et al.* v. *United States*, 342 U. S. 928; *Higgins* v. *United States*, 160 F. 2d 222 (C. A. D. C.), certiorari denied, 331 U. S. 822; *United States* v. *Compagna*, 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867, rehearing denied, 325 U. S. 892. See also *Holmgren* v. *United States*, 217 U. S. 509, 520–523.

When this case was here previously, this was the rule which petitioner appeared to urge the Court to apply. He then argued (Brief for Petitioner, No. 304, October Term, 1953, p. 46):

> Thus, the court [below] departed from the well-settled principle that outside contacts with a jury raise a presumption of prejudice, *Mattox* v. *United States*, 146 U. S. 140, 150, and that the presumption *can be overcome* only by affirmatively showing that there was no prejudice *in fact*. *Stone* v. *United States*, 113 F. 2d 70, 77–78 (C. A. 6th); *Little* v. *United States*, 73 F. 2d 861 (C. A. 10th); *Wheaton* v. *United States*, 133 F. 2d 522 (C. A. 8th). [Emphasis added.]

What petitioner now contends (Pet. Br. 27–34), however, is that the presumption of prejudice which is raised upon a showing of an extraneous jury contact of a serious nature, relating to the case, is tantamount to a conclusive presumption. He argues that, under such circumstances, the presumption requires a new trial "unless the circumstances foreclose any reasonable possibility

of harm" (Pet. Br. 27). Hence, he urges that the trial court was required to find, not only that there was no actual harm to petitioner, but in addition that there was no reasonable possibility of harm.

But if this Court had contemplated that the presumption which attached to the extraneous jury contacts in this case was of a conclusive character, it is, as Judge Goodman pointed out (R. 38), highly unlikely that it would have remanded the case for a hearing. It was conceded, when the case was here before, that a remark had been made to the jury foreman suggesting that he could profit by bringing in a verdict favorable to petitioner, and that this incident had been investigated by the F. B. I. (347 U. S. at 228). This was undoubtedly a factual situation which, *in limine*, showed a "reasonable possibility of harm", and, if this Court had thought it proper to apply to these conceded facts a conclusive presumption, such as that indicated in the cases on which petitioner relies, it would, as Judge Goodman said (R. 38), have unquestionably ordered a new trial as a matter of law. But this Court did not do so. Instead, it held that a presumption of prejudice had been raised, which, although not conclusive, imposed a heavy burden of proof upon the Government to overcome, and then remanded the case to the District Court for a hearing to determine whether the extraneous

contacts were, as a matter of fact, harmful to petitioner.

To support his contention, petitioner relies (Pet. Br. 27–29) upon *Stone* v. *United States*, 113 F. 2d 70, 77 (C. A. 6); *Little* v. *United States*, 73 F. 2d 861, 865 (C. A. 10); *Rubenstein* v. *United States* (C. A. 10), decided September 1, 1955, 1955 Fed. Tax Rep., Vol. 5, ¶ 9708; and *United States* v. *Marine*, 84 F. Supp. 785, 787 (D. Del.). But the pronouncements in those cases, with respect to the quantum of proof required to overcome the presumption of prejudice attaching to an extraneous jury contact, are contrary to this Court's holdings in *Mattox* and the instant case. In both the *Mattox* and the present case, this Court held that such a presumption may be overcome by a clear showing that the jury contact, in fact, was harmless.

The *Stone* and *Marine* cases hold that the presumption of prejudice is overcome only by a showing that no harm *might* (*Stone*, p. 77) or *could* (*Marine*, p. 787) arise from the jury contact. And the *Little* case (p. 865) holds that there must be a showing that the contact was *necessarily* harmless. Application of the doctrines of those cases, however, has the effect of turning the rebuttable presumption into a conclusive one for it is the reasonable possibility of harm inherent in serious extraneous jury contacts which provides the basis for the presumption of

prejudice which this Court has held is rebuttable. A serious contact cannot be mathematically proved to be "necessarily" harmless, and if such a contact is therefore to be treated as necessarily harmful, as in the *Little* case, it cannot, under any factual showing, be found to be harmless, and the presumption would be conclusive in its effect. And if there must be a clear showing, as held by the *Stone* and *Marine* cases, that no harm *might* or *could* have resulted from the jury contact, then the courts would, under their ordinary fact-finding processes, be powerless to make a determination of harmlessness, since it could not be done on the basis of any proven fact but only by resort to speculation. In the circumstances, application of the doctrine of the *Stone* and *Marine* cases would render the presumption conclusive in its effect, in contravention of this Court's holdings that it is rebuttable.

Petitioner characterizes the rule of the *Stone*, *Marine*, and *Little* cases as the "objective test of whether the evidence foreclosed all reasonable possibility of prejudice". (Pet. Br. 28), and asserts that the District Court erred in not applying that test in determining whether the extraneous jury contacts in the instant case were harmful. We submit that the District Court was not required to apply any test other than that adopted

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*The *Stone*, *Little* and *Marine* cases tend to confuse the basis for the presumption with the quantum of proof required to rebut the presumption.

by this Court in its prior opinion in this case and directed by its mandate remanding the case for a hearing.[17] The mandate called only for a factual determination whether the extraneous contact was harmful, and that is precisely what the District Court did. Hence, the District Court did not misconstrue the rule adopted by this Court with respect to the quantum of proof required to overcome the rebuttable presumption arising out of the extraneous jury contacts in this case. In any event, as we show in Point II of this brief, if the burden of proof is somewhat higher than we have argued, it was met in this case; the evidence supporting the finding of the District Judge that the extraneous jury contacts were in fact harmless to petitioner also foreclosed any real likelihood of their being harmful to him.

## II

### THE GOVERNMENT HAS MET ITS BURDEN OF ESTABLISHING AFFIRMATIVELY THAT THE EXTRANEOUS JURY CONTACTS WERE HARMLESS

The hearing held pursuant to the mandate of this Court was a full and unrestricted inquiry into the matters complained of by petitioner. The

[17] This Court, in its prior decision, relied entirely upon *Mattox* v. *United States*, *supra*, and *Wheaton* v. *United States*, *supra*, which recognize the rebuttable nature of the presumption, and did not mention *Stone* v. *United States*, *supra*, and *Little* v. *United States*, *supra*, despite the fact that the latter two cases had been cited by petitioner (*supra*, p. 26).

District Court did not restrict the scope of the hearing. This is amply demonstrated by the record. The Government presented the testimony of every person (twenty-six witnesses) who could possibly have had any knowledge of the matters in question. Petitioner had full opportunity for the presentation of evidence and for cross examination. He presented testimony and other evidence, and his counsel conducted a searching and exhaustive cross examination of the Government's principal witnesses. Moreover, due to the nature of the inquiry, Judge Goodman allowed the parties wide latitude and did not insist upon strict adherence to the technical rules of evidence.

The private communications involving juror Smith, his conversation with Satterly, his discussion of the conversation with Judge Foley, and his interview with F. B. I. Agent Callister, were thoroughly probed at the hearing. Judge Goodman found as a fact that the extraneous contacts were harmless to petitioner and in no way affected the fairness of his trial or the jury's verdict. (R. 38–39.) We submit that the findings of the trial court are fully supported by the evidence, and that the District Judge did not err in finding that the extraneous jury contacts were harmless. His refusal to grant a new trial is therefore not reviewable here, since he committed no abuse of discretion in his findings and conclusions. Moreover, the Court of Appeals concurred in his findings of fact (R. 340), and concurrent findings of

two courts below are final here in the absence of exceptional error. *Comstock v. Group of Investors*, 335 U. S. 211, 214; *Delaney v. United States*, 263 U. S. 586, 589–590; *United States v. Johnson*, 319 U. S. 503, 518. No exceptional error has been shown in this case.

It is clear from Smith's testimony and from that of Judge Foley and F. B. I. Agent Callister that Smith regarded Satterly's remark concerning petitioner as made in jest. Judge Goodman so found as a fact. Moreover, the record shows that Smith had good reason to believe that Satterly had spoken in jest. Smith was well acquainted with Satterly, although the two were not as petitioner suggests (Pet. Br. 7, 19) close personal friends; their acquaintanceship was based solely upon business transactions and a few chance meetings at a hunting club of which both were members. Smith knew that Satterly was in the habit of joking and had at times engaged in banter with him. Satterly had a valid reason for calling at the Smith home that evening; he did not go there under a pretext. After he had made the remark in question and had been informed by Smith that the latter could not discuss anything in connection with petitioner's case, he laughed and said no more about the matter. Satterly was packed and ready to leave Reno, permanently, when he called at the Smith home, and he actually departed from Reno the next day without leaving any immediate forward

ing address. These and other circumstances of the conversation all point to the reasonableness of the conclusion reached by Smith that the remark was intended as a joke. That Smith with good reason regarded the remark as such is persuasive evidence that he was not thereby prejudiced against the petitioner.

The fact that Smith, after turning the remark over in his mind for a day, decided to discuss it with Judge Foley, is not inconsistent with and does not detract from his impression of the remark as a joke. As Judge Goodman observed (R. 37–38), Smith appeared to be a "forthright and honest man who took his duties as a juror with the utmost seriousness and with a full understanding of his responsibility." Smith decided to report the matter to Judge Foley because he could not resolve in his own mind the question whether the conversation came within the scope of the Judge's customary pre-recess instructions to the jury. Also, he recognized that he could not be absolutely certain of Satterly's intentions. He concluded, therefore, that he should not rely solely upon his own judgment in the matter. As a conscientious juror, Smith prudently sought the advice of Judge Foley who confirmed his impression of the remark as a joke and instructed him to regard it as such. Smith's discussion of the conversation with Judge Foley had, if anything, a salutary effect in that it relieved his mind of any concern over the matter.

Smith not only regarded Satterly's remark as a joke, but he never entertained the thought that Satterly was connected with the defense. The latter fact is strongly indicative of the absence of prejudice on Smith's part. Smith testified unequivocally that, even had he considered Satterly's remark as a serious proposal (he recognized the possibility that Satterly may have been feeling him out), he would not have regarded the proposal as emanating from the defense. Under this hypothesis, Smith testified that he "would have thought that possibly Mr. Satterly was trying to make a deal for himself" (R. 97), and that, as he related to F. B. I. Agent Callister, if his [Smith's] reception had been cordial, Satterly might have considered contacting the petitioner and suggesting a deal. Satterly, as a matter of fact, had no known association with the petitioner and knew him only by sight.

Petitioner attaches considerable significance (Pet. Br. 15–18) to the reference in Satterly's remark to petitioner's sale of the Cal-Neva Club. He argues that the implication in the remark that he evaded tax on the sale of the Club was never negatived, in that Smith was never advised of the falsity of the statement, and that, consequently, there is no evidence to support Judge Goodman's finding that the remark was harmless. The argument ignores the facts that Smith considered the whole remark a joke and that he was instructed by the court to regard it as such. Ob-

viously, under such circumstances, there was nothing for the court to neutralize, and further emphasis might have been disadvantageous to petitioner.

Also strongly indicative of the absence of prejudice is the fact that Smith "wiped the matter" completely from his mind after discussing it with Judge Foley and Agent Callister (R. 65–66, 106–108). It was not brought to his attention again until after the verdict was returned, and when it was then called to his attention by newspaper reporters it had so completely left his mind that he was "dumbfounded" and "astonished" by their questions (R. 66, 102–107). Petitioner seeks to infer (Pet. Br. 25) that "the incident actually remained on the top of Smith's mind" because he mentioned it to juror Tinkham while riding home on the night the verdict was returned and discussed it with alternate juror Morris two weeks after the trial. The inference is unwarranted. Neither the Tinkham nor the Morris conversation with Smith took place until after the return of the verdict and until after the incident had been recalled to Smith's mind by the newspaper reporters.

The fact that Smith never considered the Safferly conversation to be serious, and the further fact that he forgot it entirely, amply support the District Judge's finding that the incident was harmless. And the evidence that he had so dis-

missed the matter from his mind as to forget it completely foreclosed any real possibility or likelihood that the incident was harmful to petitioner.[18]

As a Government witness, Smith was permitted over petitioner's objection to testify directly that the conversation between him and Satterly did not in any way prejudice his verdict in the case (R. 61–65). But the District Judge expressed some doubt whether, under this Court's decision in *Matter* v. *United States*, 146 U. S. 140, his testimony was properly admissible, and he indicated that he would not base his decision on the opinions of the witnesses. But he also indicated that petitioner's objection to the testimony went solely to its weight. In the latter respect the District Judge was correct. Although this Court in *Mattox* v. *United States*, 146 U. S. 140, approved the rule that a juror may not, on a motion for a new trial based on the bias of one juror, testify as to the motives and influences which affected the verdict, yet the Court in the later case of *McDonald* v. *Pless*, 238 U. S. 264, 269, stated that "the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict." To the same

[18] We do not, of course, concede that there was any burden on the Government, as petitioner contends, to adduce evidence that would foreclose any reasonable or real possibility of harm. See, *supra*, pp. 24–26. But in the instant case, the Government's evidence was sufficient to meet even petitioner's version of the quantum of proof.

effect, see *Ryan* v. *United States*, 191 F. 2d 779, 781 (C. A. D. C.), certiorari denied, *sub nom. Duncan et al.* v. *United States*, 342 U. S. 928. See also *Higgins* v. *United States*, 190 F. 2d 232, 223 (C. A. D. C.), certiorari denied, 333 U. S. 822.

It is clear, therefore, that Smith's statement that he was not prejudiced by the Satterly conversation was properly admitted in evidence by the District Judge. And since it was corroborated by other evidence, it was entitled to such weight as the District Judge might accord it in connection with the other evidence in the case.

The subject and purpose of the F. B. I. investigation is how clearly established by the record. Satterly and not Smith was the subject of the investigation. Although Judge Foley believed that Satterly's remark had been made in jest, he was not entirely certain of the latter's intentions. He, naturally, recognized the possibility that Satterly's remark may have been intended as a serious proposal and that, if so, it may have originated with the defense. Consequently, he requested an investigation of Satterly's background and associations in an effort to determine whether the latter had any ulterior motive in making the remark. As Judge Foley testified, "we believed that this was just a joke * * * but we wanted an investigation to make sure, to see what this man Satterly was after, whether it was just a joke or whether it was serious." (R. 136–

137). Petitioner argues (Pet. Br. 18–21), however, that since Judge Foley requested an investigation without informing the defense, he did not act as if he really believed that the remark was intended as a joke. This is a *non sequitur*. The investigation was sought to confirm or disprove the belief, and during the inquiry it was reasonable for the judge to act as if Satterly's "proposal" was serious and was connected with the defense. Moreover, the critical issue is not how the court viewed the remark but how Smith reacted to it.

Furthermore, Smith was fully informed and was well aware of the fact that it was Satterly's conduct which was under investigation, and that his own conduct was in no way suspect. The investigation of Satterly was actually concluded within three days and failed to disclose any information indicating that Satterly intended the remark as anything more than a joke. Since this was Smith's impression of Satterly's remark and since he had been instructed by the court to regard it as such, there was no necessity to make a further contact with him to advise him of the outcome of the investigation. Petitioner's statement (Pet. Br. 19) that "the F. B. I. continued to look over Smith's shoulder until the verdict came in" is at variance with the facts, as are his statements that Smith was "uneasy as to how the Government interpreted 'the incident'"; that he entertained "anxiety and concern" over the out-

comic (Pet. Br. 20); and that he "wondered" if he were suspect (Pet. Br. 25). The record shows that there was never any suspicion or suggestion of improper conduct on the part of Smith, and he was made fully aware of this.

Contrary to petitioner's contentions (Pet. Br. 36–37), the alleged conversation between juror Curnow and deputy marshal Boyd was also thoroughly probed at the hearing. It was alleged (R. 195–198) for the first time at the hearing that an irregular private communication involving juror Curnow had occurred during the trial. This allegation was not contained in either the petitioner's motion for a new trial (R. 12–17), or in the affidavit in support thereof (R. 3–12), which was filed in the District Court in February 1952. Also, it was not referred to previously when this case was before this Court, although petitioner was then in possession (R. 495–207) of substantially the same information with respect thereto as was disclosed at the hearing. Consequently, Judge Goodman questioned whether the matter was within the scope of the hearing ordered by this Court (R. 195–198). However, Judge Goodman, as petitioner concedes (Pet. Br. 36), admitted the evidence relating to the conversation on the ground that it might have some relation to the Smith-Satterly incident. The fact is that petitioner was given full opportunity to explore the matter at the hearing.

Curnow testified that, at some point during the trial, Boyd asked him whether he had heard any discussion among the jury indicating that one of the panel had been approached; to which Curnow replied in the negative; and that upon his inquiring of Boyd why the question was asked, the latter replied, "he was just curious." A signed statement obtained from Curnow, shortly before the hearing, relates substantially the same matters. Boyd denied asking Curnow anything pertaining to the case. He stated that during the trial he did not hear of any incident involving a juror.

Judge Goodman concluded that the evidence was too vague to support a finding that the alleged conversation between Boyd and Curnow took place, but he found that if the alleged conversation to which Curnow testified actually took place, it did not in any way affect the integrity of the verdict. The record supports Judge Goodman's finding, because the text of the alleged conversation shows on its face that it was without significance.

Assuming, *arguendo*, that Curnow's testimony reflects the facts and that Boyd actually made the inquiry in question, the evidence shows that Curnow was not thereby prejudiced against petitioner. In his signed statement which was introduced in evidence by petitioner's counsel (R. 210), Curnow categorically disclaims any preju-

dice or bias against petitioner as a result of the conversation (R. 211).

## CONCLUSION

The District Court correctly construed and applied the law, announced by this Court's prior opinion, as to the rebuttable nature of the presumption of prejudice which arises from an extraneous jury contact, and that court's finding that the extraneous jury contacts involved herein were in fact harmless to petitioner is clearly supported by the evidence and did not, therefore, constitute an abuse of discretion. The decision of the court below should be affirmed.

Respectfully submitted.

SIMON E. SOBELOFF,
*Solicitor General.*

H. BRIAN HOLLAND,
*Assistant Attorney General.*

JOHN R. BENNEY,
*Assistant to the Solicitor General.*

JOSEPH M. HOWARD,
JOHN J. MCGARVEY,
*Attorneys.*

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